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Supreme Court of the United States

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM, PETITIONER,

vs.

UNITED STATES LINES COMPANY.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 3, 1961

CERTIORARI GRANTED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM, PETITIONER,

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**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Civ. 134-261

JAMES VICTOR SALEM, Plaintiff-Appellee,

against

UNITED STATES LINES COMPANY, Defendant-Appellant.

On Appeal From the United States District Court
for the Southern District of New York

**Appendix to Brief for Defendant-Appellant
—Filed April 1, 1961**

[fol. 1]

**IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Civ. 134-261

Jury demand date: By plttf 6-12-58.

JAMES VICTOR SALEM,

vs.

UNITED STATES LINES COMPANY.

For plaintiff:

DiCostanzo & Klonsky
66 Court St., Bklyn (1)

For defendant:

Kirlin, Campbell & Keating
120 B'way (5)

DOCKET ENTRIES

- June 12-58—Filed complaint and issued summons.
 June 26-58—Filed summons & return, served deft. 6-19-58.
 Oct. 9-58—Filed Answer of deft.
 Oct. 29-58—Filed plttf's notice of examination before trial.
 Mar. 17-59—Filed Note of Issue & statement of readiness.
 June 4-59—Filed plttf's interrogatories.
 June 26-59—Pre-trial before Weinfeld, J.
 July 17-59—Filed deft's answers to interrogatories.
 Mar. 4-60—Filed affdt. exh. & notice of motion for a preference of trial—Ret. 3/3/60.

[fol. 2]

- Mar. 4-60—Memorandum endorsed on notice of motion filed 3/4/60—Pltff's motion granted to extent of placing this suit at the Head of the Ready Day Trial Calendar for the October 1960 Term. So ordered—Ryan, J.
- June 2-60—Filed supplemental interrogs.
- July 11-60—Filed deft's supplemental answers to interrogatories.
- Aug. 1-60—Filed deft's interrogatories.
- Sept. 20-60—Pre-trial before Levet, J.
- Oct. 19-60—Filed pltff's answers to interrogatories.
- Oct. 20-60—Before Levet, J. Trial begun.
- Oct. 21-60—Trial continued
- Oct. 24-60—Trial continued
- Oct. 25-60—Trial continued and concluded—Deft's motion for a mistrial Granted. Case Returned to Calendar—Levet, J.
- Nov. 23-60—Before Ritter J.—Jury empanelled—trial begun
- Nov. 25-60—Trial cont'd.
- Nov. 28-60—Trial cont'd.
- Nov. 29-60—Trial cont'd.
- Nov. 30-60—Trial cont'd & concluded. Jury verdict in favor of pltff. for \$110,000.
- Dec. 6-60—Filed affidvt. & notice of motion for an order granting judgment to the deft. notwithstanding judgment.
- Dec. 9-60—Memo endorsed on motion filed 12-6-60.—motion denied settle order.—Ritter, J.
- Dec. 9-60—Filed pltff's affidvt. in opposition.

- Dec. 9-60—Filed judgment #63,895 & order granting judgment on unseaworthiness for \$110,000.00 and for maintenance & cure \$13,968.00 [fol.3] making a total of \$123,968 with costs. —Ritter, J.—Judgment entered.—Clerk.—mailed notice.
- Jan. 6-61—Filed order denying deft's motion for judgment.—Ritter, J.
- Jan. 6-61—Filed notice of appeal. Mailed notice to DiC & K.
- Jan. 9-61—Filed amended notice of appeal. Mailed notice to Di & K.
- Jan. 13-61—Filed affdvt. & bill of costs as taxed in the sum of \$14.63.
- Feb. 28-61—Filed transcript of record of proceedings of October 21 & 22, 1960.
- Feb. 28-61—Filed transcript of record of proceedings of October 21, 1960.

[fol. 4]

IN UNITED STATES DISTRICT COURT

AMENDED NOTICE OF APPEAL—Filed January 9, 1961

Sir:

Please Take Notice that the defendant hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered on December 9th, 1960 which provided that the plaintiff recover from defendant the sum of \$110,000, under the Jones Act or for unseaworthiness, with the additional sum of \$13,968.00 for maintenance and cure, making a total of \$123,968.00 with costs, and

Please Take Further Notice that the defendant also appeals (and will bring up for review on the foregoing appeal) from the memorandum decision entered on December 9, 1960 which denied the motion of the defendant for

judgment notwithstanding the verdict or for a new trial and, from the order thereon entered on January 6, 1961.

Dated: January 6, 1961.

Kirlin, Campbell & Keating, By Walter X. Connor,
A Member of the Firm, Attorneys for Defendant,
Office & P. O. Address: 120 Broadway, Borough
of Manhattan, City of New York 5.

To: Di Costanzo & Klonsky, Esqs., and Herman N. Rabson, Esq., Attorneys for Plaintiff, 66 Court Street, Brooklyn 1, New York.

[fol. 5]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING
THE VERDICT OR FOR A NEW TRIAL—December 27, 1960—
Filed January 6, 1961

Defendant having moved for an order granting judgment to the defendant notwithstanding the verdict, or in the alternative for a new trial, and said motion having come on to be heard before Honorable Willis W. Ritter on December 9, 1960, and the Court having filed its memorandum decision denying said motion, and directing settlement of an order, it is

Ordered that said motion be and is hereby denied in all respects.

Dated: New York, New York, December 27th, 1960.

Willis Ritter, U. S. D. J.

[fol. 6]

IN UNITED STATES DISTRICT COURT

ORDER AND JUDGMENT, APPEALED FROM—December 9, 1960—
Filed December 9, 1960

The issues of the above entitled action having been brought on for trial before Honorable W. W. Ritter, District Judge, and a jury on November 23, 25, 28, 29 and 30,

1960, and the Court having submitted the first three causes of action for Jones Act negligence and unseaworthiness to the jury, and reserving the fourth cause of action unto itself as to maintenance and cure, and the jury having rendered a verdict in favor of the plaintiff in the sum of \$110,000.00, and having found that the plaintiff is entitled to accrued maintenance and cure from November 28, 1958 during periods of outpatient treatment at United States Public Health Service facilities in the sum of \$5,208.00, and for three years subsequent to November 30, 1960 in the sum of \$8,760.00, in the total sum of \$13,968.00, it is

Ordered, Adjudged and Decreed, that on the causes of action under the Jones Act or for unseaworthiness the plaintiff is entitled to the sum of \$110,000.00, (975) and it is further

Ordered, Adjudged and Decreed, that the plaintiff recover of and from the defendant the additional sum of \$13,968.00 on the cause of action for maintenance and cure, for a total of \$123,968.00, together with costs on the judgment recited above to be taxed by the Clerk of this Court.

Willis W. Ritter, U. S. D. J.

Herbert A. Charlson

Judgment Entered: This 9th day of December, 1960.

[fol. 7]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S NOTICE OF MOTION FOR JUDGMENT NOTWITH-
STANDING THE VERDICT—December 2, 1960

Sir:

Please Take Notice that on the annexed affidavits of Walter X. Connor, James P. O'Neill and Walter C. Jourda, the undersigned will move this court before the Honorable W. W. Ritter on the 9th day of December 1960 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard under Rule 50 (b) of the Federal Rules of Civil Procedure for an order granting judgment to the

defendant notwithstanding the verdict, or in the alternative for a new trial and for such other, further and different relief as may be just and proper in the premises.

Dated, New York, December 2, 1960.

Yours, etc.,

Kirlin, Campbell & Keating, By Walter X. Connor,
A Member of the Firm, Attorneys for the Defendant.

To: Herman Rabson, Esq., Di Costanzo & Klonsky, Esqs.,
Attorneys for Plaintiff.

[fol. 8]

AFFIDAVIT OF WALTER X. CONNOR, IN SUPPORT OF MOTION
State of New York,
County of New York, ss.:

Walter X. Connor, being duly sworn, deposes and says:

I am a member of the firm of Kirlin, Campbell & Keating, attorneys for the defendant herein and I am familiar with all the pleadings and proceedings heretofore had.

I was trial counsel for the defendant in a trial before Judge W. W. Ritter and a jury on the 23rd, 25th, 28th, 29th and 30th days of November. At the end of the trial, the jury awarded a verdict to the plaintiff on three causes of action for a sum of \$110,000 without distinguishing on which of the three causes of action the verdict was based. Thereafter, the court awarded to plaintiff on the fourth cause of action for maintenance a sum of money equal to three years future maintenance and such other maintenance as may be found to be unpaid to the date of the verdict.

At the close of the evidence defendant moved for a direction of a verdict as to each of the three causes of action seeking indemnity, on which motion the court reserved decision. After the jury returned its verdict, defendant moved for judgment in accordance with its motion for a directed verdict notwithstanding the verdict. This motion was denied.

The second cause of action which charged that the defendant was negligent because of alleged negligent acts on the part of one, Richards, in failing to safely rescue plaintiff was without substance. It was clear from the testimony of both plaintiff and defendant that rescue could not be effected by Richards alone, that help was required, and accordingly he had to leave plaintiff in order to telephone the bridge for such help. Prior to doing so, he had received plaintiff's assurance that plaintiff could hold on while the call was made. Thus there was utterly no basis for any finding of negligence.

Since it cannot be determined upon what the jury based its damage award, the verdict should be set aside.

Moreover, stripped of claims which were un-proven, the vessel was not unseaworthy and none of its employees, other than Salem, was negligent. Salem alone was in charge of the "crows' nest" and the means of access to the "crows' nest". His failure to report the absence of light violated his orders and also brought about his accident.

Although the court charged the jury that plaintiff was alleging that there was defective wiring and other defective electrical equipment and that there were no hand rails and no life lines, plaintiff had not proven that there was any defective wiring or electrical equipment nor did he prove by any expert evidence that there should have been life lines or hand rails. Consequently, there was no adequate or substantial evidence on which the jury could make the finding of either negligence or unseaworthiness. Defendant's motion for a directed verdict should have been granted.

In the alternative the defendant moves to set aside the verdict on the following grounds:

1. The jury's verdict included items not properly damages.

2. Defendant's evidence was excluded which tended to show that plaintiff's alleged conversion hysteria was due to his marital problems and not his accident.

3. The court excluded additional evidence, which included an exact size model of the platform in the radar tower where the accident occurred.

4. The defendant did not have a fair trial.

[fol. 10] Some of the prejudicial rulings are here noted:

(a) The court made an improper and prejudicial statement to the jury with respect to defendant's liability and refused to withdraw it on motion by the defendant. The court stated in substance in the early part of the plaintiff's case, "There must have been something wrong with the ship if so many bulbs were needed or so many bulbs were burned out".

(b) Prior to summation the court cautioned counsel not to interrupt each other during summation stating that any improper statements would be dealt with after both sides had concluded summation. Plaintiff's counsel made at least 4 highly prejudicial and improper statements to the jury.

Several times he told the jury that defendant's counsel wanted the jury to "throw plaintiff out in the street". He charged defendant's counsel with being cruel. These were obvious appeals to passion and prejudice. Before the charge to the jury defendant took exceptions to these remarks, in accordance with the court's required procedure and asked the court to instruct the jury in respect of these remarks. The court denied defendant's application.

(c) The court in its charge repeatedly recited the claims of negligence and unseaworthiness made by plaintiff, and indeed, in some cases embellished them. The repetition of these charges and the embellishment of them was highly prejudicial to the defendant. As an example of the latter, the court referred to a claim that there should have been a railing or other safety devices; that there was dangerous wiring and defective lighting equipment.

5. The award of \$110,000 was excessive and should be set aside. While the plaintiff maintained that he was unable to bend and walked with a limp, motion pictures of him showed the contrary to be true. Plaintiff's Doctor Kaplan admitted if the plaintiff's history were untrue, then his [fol. 11] diagnosis of permanent injury would fail. Doctor Graubard's testimony with respect to an herniated disc was based on x-ray films alone, which Doctor Graubard had previously said would not afford any basis for such a diagnosis.

Finally the plaintiff in his application for drivers' licenses denied that he was suffering from any mental or physical disability during the periods between his accident and the trial.

6. The verdict was excessive because the jury added to what it found as damages an additional 33 1/3% in order to compensate plaintiff's counsel.

After the jury was discharged and while I was standing in the hall awaiting an elevator, plaintiff's counsel Mr. Herman Rabson approached several members of the jury to discuss with them their deliberations in reaching the verdict. During this discussion, juror No. 2, Mr. John B. Turner asked Mr. Rabson what fee he would receive out of the award. Mr. Rabson replied "approximately one third". Thereupon, Mr. Turner stated in a voice which could be heard any place in the corridor "that is exactly what we thought and we predicated our award on that basis in arriving at our verdict". This was heard by Mr. O'Neill and Mr. Jourda, whose affidavits are annexed hereto.

It needs no citation of cases to establish that a jury may not increase a plaintiff's damages by what they conceive to be the legal fee plaintiff will have to pay his attorney.

In this respect alone the verdict is excessive and illegal.

7. Under the law as established by the United States Supreme Court in *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525 and since followed by a legion of cases, an award for maintenance cannot be made for a lengthy period of time. All that may be awarded is an amount which will satisfy the seaman's needs in the immediate future. [fol. 12] In addition, there was no evidence adduced at the trial that the plaintiff required further treatment. Certainly there was no evidence that he will require treatment for three years. There was no testimony that he would require treatment for six weeks beyond the trial. It is quite true, that the marine hospital had made an appointment to see plaintiff in December but this by no means is sufficient basis for awarding three years' maintenance.

In view of the foregoing, defendant respectfully alleges that the verdict should be set aside and judgment granted

to the defendant or in the alternative that the verdict be set aside and the maintenance award cancelled on the ground that the verdict is contrary to the evidence, contrary to the law and was excessive, both as to the indemnity and to the maintenance.

The verdict should be set aside because of prejudicial error committed throughout the trial and the charge of the court.

Walter X. Connor

(Sworn to before Salvatore P. Milazzo, December 2, 1960.)

[fol. 13]

AFFIDAVIT OF JAMES P. O'NEILL, IN SUPPORT OF MOTION

State of New York.

County of New York, ss.:

James P. O'Neill, being duly sworn, deposes and says:

I am an attorney at law, associated with the firm of Kirlin, Campbell & Keating, attorneys for the defendant herein.

I was in the corridor on the fifth floor of the United States Courthouse outside Room 518 and I heard the conversation related in Mr. Connor's affidavit annexed hereto, which I have read. I agree with his recitation of what took place.

I was called by Mr. Connor to the witness stand to testify to this, but on objection of plaintiff's counsel, the court did not permit me to testify.

James P. O'Neill

(Sworn to before Salvatore P. Milazzo, December 2, 1960.)

[fol. 14]

AFFIDAVIT OF WALTER C. JOURDA, IN SUPPORT OF MOTION

State of New York,

County of New York, ss.:

Walter C. Jourda, being duly sworn, deposes and says:

I was present in the corridor on the fifth floor of the United States Courthouse outside Room 518, with Mr. Connor and Mr. O'Neill. I have read their respective affidavits.

I, too, heard the conversation related in Mr. Connor's affidavit and concur with his recitation of what took place.

W. C. Jourda

(Sworn to before Salvatore P. Millazzo, December 2, 1960.)

[fol. 15]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civ. 134-261

JAMES VICTOR SALEM, Plaintiff,

vs.

UNITED STATES LINES COMPANY, Defendant.

Before: Hon. Willis W. Ritter, District Judge.

***Excerpts From Testimony—November 23, 1960**

APPEARANCES:

DiCostanzo & Klonsky, Esqs., Attorneys for Plaintiff,
By: Robert Klonsky, Esq.

Kirlin, Campbell & Keating, Esqs., Attorneys for De-
fendant, By: Walter X. Connor, Esq.

Mr. Klonsky: May we approach the Court with respect to his last remark?

(Conference at the bench as follows:)

Mr. Klonsky: I have directed a letter to Mr. Connor with respect to this mock-up model that he referred to, that at the time of trial, if he seeks to introduce it, as he indicated he would, I would object to same. Before he talks to the Jury with respect to what this model means and what [fol. 16] it is, there should be some disposition. He should not assume that something like this would be admitted.

Mr. Connor: The only objection you made is to having it in the courtroom. You did not say you would object to it going into evidence.

The Court: What would be the basis of your objection?

Mr. Klonsky: The objection is that the particular mock-up model is immaterial, and because of its nature is entirely misleading and entirely prejudicial. It is made of wood when it should be metal. It has certain fixtures or cables in it which are not the same as those in the photographs. The light is different. I think in major respects it is prejudicial to the plaintiff.

The Court: We can go ahead and you don't have to say anything more about it.

Mr. Connor: I am not going to say anything more about it, your Honor.

.

JAMES VICTOR SALEM, called as a witness on his own behalf, having been first duly sworn, testified as follows:

.

The Witness: I don't speak good English, but I will do the best I can.

The Court: It sounds to me you speak pretty good English.

.

Direct examination.

By Mr. Klonsky:

Q. You told us where the first light would be, that is, the light right at the door as you enter.

A. Yes.

Q. Then you go up at an angle and then you go straight up. Where is the next light located?

A. The next light?

Q. The next fixture, that is.

A. The next one is on the first platform. There is the next one. The light is on top there, on top of the platform.

[fol. 17] Q. That's the second light?

A. The second light, yes.

Q. The third light, where is that located?

A. The third light is located on the platform going to the crow's nest.

Q. That's the crow's nest platform?

A. Yes.

Q. The platforms below the crow's nest platform, are they as big as the crow's nest platform?

A. Repeat that, please.

Q. The platforms below the crow's nest platform, are they as big as the crow's nest platform?

A. Oh, yes; much bigger.

Q. They are big?

A. Yes, much bigger.

Q. Are they bigger?

A. Big.

Q. They are big; but are they bigger than the crow's nest platform?

A. No. It is the same size as the platform, but it is big because the other one sticks out. The other one is no crow's nest. That's why it got more room.

Q. The crow's nest takes up some of the space of the platform?

A. Yes.

Q. This third light we are talking about, that is a light that is near this crow's nest platform, isn't it?

A. That's right.

Q. We have agreed it is about 22 inches above the platform.

A. It's about that much, yes.

Q. Are there other light fixtures in that tower?

A. Yes. There are two more lights on top that light going to the crow's nest; two more.

Q. Further up?

A. Yes.

Q. Mr. Salem, do you recall about how much watts each bulb had in these fixtures?

Mr. Connor: At what time?

Q. On February 15 and 16, 1958.

Mr. Connor: I have no objection to his answering, if he knows.

Q. If you know.

A. I believe it is about 40 watts.

[fol. 18] Q. That is your best recollection?

A. That's the best. Maybe more. I don't know.

Q. The two upper lights, Mr. Salem, the two on top, could you tell us what you observed about the condition of those two top lights for say five months before your accident?

A. Well, as far as I know, these two top lights I never see them on.

Q. Never lit?

A. No, never lit.

Q. With respect to the three lights, below those two top lights which were never lit for months before, what did you observe before the accident about the condition of lights one and two? Do you know what I mean by one and two?

A. One from the bottom—

Q. One would be at the door and two would be before you get to the crow's nest.

A. Well, I will tell you. We have too much trouble with those lights. There comes words from even the other two lookouts.

Mr. Connor: That isn't responsive to the question. I move to strike that. The question is what did he observe.

Mr. Klonsky: That isn't your objection, Mr. Connor.

Mr. Connor: If counsel wants to adopt what he said, that's all right.

Mr. Klonsky: I do, that they had trouble with these lights before. I think that is a matter of observation.

The Witness: The reason I said this is because the other two fellows—

Mr. Connor: I object to any volunteered answer by the witness.

The Court: He can answer that. The objection is overruled.

The Witness: The reason for this is because almost all of the trouble of this light come from the other two men, and when I relieve him, he told me so.

[fol. 19] Mr. Connor: I move to strike that out as hearsay.

The Court: That may be stricken.

.

Q. Whose job is it to take care of the wiring and the lights inside the radar tower?

A. They got a special electrician for that.

Mr. Connor: If he knows.

Mr. Klonsky: He has been on this ship for several years.

The Court: Do you know who is in charge of fixing the wiring?

The Witness: Yes.

The Court: Who is it?

The Witness: They got a special electrician for that.

Q. It is their sole job to do the work with the wiring and with the lights; is that right?

A. That is the job he had, yes.

.

Q. Describe that platform for us.

A. Before the accident?

Q. Before the accident.

A. Well, before the accident—

Mr. Connor: Your Honor, I object to that, unless we have a time fixed.

Mr. Klonsky: Before the accident and up to the time of the accident. Would that be satisfactory? It is a general description of this particular platform.

The Court: It is the time shortly before the accident.

Mr. Connor: If he is referring to that same voyage, I have no objection.

The Court: On that same voyage, a few days before the accident, can you tell us?

The Witness: Just two days, your Honor?

[fol. 20] Q. No. What you saw about that platform during the voyage before your accident happened.

A. As far as I know, I never see that this platform has been painted.

Q. It was never painted?

A. No.

Q. What else did you observe?

A. It is always very slippery to fall.

Q. When you say slippery, what do you mean by that?

A. It is slippery, smooth.

Q. It is smooth?

A. Yes.

Q. Do you know what I mean by a diamond or a raising or a perforation?

A. As far as I know, it is one piece.

Q. And smooth?

A. Smooth, yes.

Q. Was there anything that they provided you to grab hold of going from the ladder to the platform?

A. No.

Mr. Connor: That is leading and suggestive.

The Court: Mr. Salem, before you answer the questions, wait a minute and give Mr. Connor an opportunity to say whether he objects or not.

The Witness: I will.

The Court: Take it easy. We are not in any hurry about this. Take your time.

Mr. Connor: I have made an objection, your Honor. The question was leading and suggestive. I have no objec-

tion to the witness saying what was inside the radar tower at that level, but I think that is the way the question ought to be put.

Mr. Klonsky: My question was whether there were any handholds.

The Court: Overruled.

Q. My question to you has to do with whether at the time of the accident and shortly before there were any handholds for you. Do you know what I mean by a handhold?

A. Yes.

Q. When you came from the ladder to go onto the platform.

A. No. No grip and no handrails.

[fol. 21] Mr. Connor: Everything after the answer "no" I move to strike out.

The Court: Motion denied.

• • • • •

Q. Did you use any one of these at any time to swing over from the ladder onto the platform?

A. Not exactly use it, because it is too big to grab it, and even if you grab it by your hand, it's easy to slip.

Mr. Connor: I move to strike out everything after "no."

The Court: The motion is denied.

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Q. Mr. Salem, would you tell us how you, in usual practice, before the accident, and at the time of the accident as well, when you reached the level of the crow's nest platform, got off the ladder onto the platform?

A. Well, just from that level—not from the bottom?

Q. Forget about the lower level.

A. As soon as I reach the level, that platform, which I know is about even with the other, then I turn myself and I put my left foot to the edge of this platform, and as soon as I know my foot is secure, I move my left hand to what you call these pieces here.

Q. How do you take it around?

A. I take it around with my arm.

Q. Inside your elbow?

A. Yes. There is only one way.

Q. What do you do with your other foot?

A. As soon as I know my left foot and my left hand is in a position, then I swing myself with my right foot to the platform and at the same time I move my hand at the same time I move my right foot. That is when the lights come out.

Q. We will get to that. But this is your regular procedure?

A. Yes.

Q. You are facing the up-and-down ladder, let's say. You reach the rung that is level with the platform.

A. That's right.

[fol. 22] Q. Behind you is the crow's nest. You want to get into that room. Is that right?

A. Yes.

Q. Your two hands and two feet are on this platform. You let go with your left foot. Is that right?

A. That's right.

Q. And you bring it over this space onto the platform behind you?

A. That's right.

Q. You encircle that radar cable enclosure with your left hand?

A. That's correct.

Q. Then you let go with your right hand and right foot and come over, too?

A. That's correct.

Q. When you get both feet over, which way are you facing?

A. Forward.

Q. You are facing forward?

A. Then.

Q. Then you swung around?

A. Yes.

Q. So your right foot is further to the starboard side?

A. That's right.

Q. Then you walked?

A. That's right.

Q. Toward the crow's nest?

A. The door.

Q. The lookout area?

A. Yes.

Q. Let me ask you this. Are there any lights inside this lookout area, this bubble?

A. No.

Q. No lights allowed?

A. No.

Q. This particular light that is inside this platform, the one that is 22 inches above, did you ever see that light out before this accident?

A. No.

Q. Not that light?

A. No; but the other two, yes.

Q. This light, as far as you know, was working up to the moment of the accident?

A. On my watch. With the other two fellows, I don't know.

Q. But you never saw it?

A. My watch, no.

Q. And those two lights up above?

A. No, never light.

Q. But if you put bulbs in there, would they shine down on your platform?

A. Sure.

Q. Were they on before—

Mr. Connor: One answer ought to be sufficient.

The Court: I didn't get the time.

[fol. 23] What is it you want to say about the light?

The Witness: The two top lights are never on, they were never put on. The one in particular at the crow's nest, on my watch, I never see them out except at the accident. But the other two lights below this, yes. One day they blow and a couple of other days they blow. It is like this a couple of months.

Q. Before the accident?

A. Before the accident, yes.

Q. When you came to work at midnight, when on Feb-

ruary 15 it finished on February 16 it started, you relieved Terry, is that right?

A. That's right.

Q. When you came to this radar tower and opened the door, what did you see with respect to the first light? Was that on or off?

A. You mean from the bottom?

Q. Yes.

A. No, no lights.

Q. No light there?

A. No.

Q. You climbed up a little way. What did you see about the second light?

A. It was still not on.

Q. You got up to the crow's nest platform. Was that light on?

A. Yes.

Q. That light was on at 12 o'clock?

A. Yes.

Q. The two lights on top had always been on?

A. No, not on. They were not on.

Q. Did you talk to Terry before he left?

A. Before he left?

Q. Did you talk to him, yes or no?

A. Yes, I did talk to him.

Q. In the regular course of your work do you report to him about conditions you observe in the radar tower?

A. Of course. We discussed it for five minutes.

Mr. Connor: I object to this method of trying to get hearsay evidence in.

The Court: No. He is trying to keep it out, really. He is entitled to ask him, yes or no, whether he had any discussion with Terry in the regular course of business.

[fol 24] Mr. Klonsky: Terry will be a witness in this case, too, subject to cross examination.

Mr. Connor: I must object to any conversation or any question which implies anything.

The Court: He is not doing that.

Mr. Connor: I would like to object to any question which implies the subject matter of hearsay conversation.

The Court: If there is anything like that, we will sustain it.

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Q. Did you call the bridge at that time to talk about the lights you saw were out? Yes or no.

A. No.

Q. You had talked to Mr. Terry before?

A. Yes.

Mr. Connor: I object to that. There it is again. I knew he would do it.

Mr. Klonsky: There is a reasonable inference to be drawn, your Honor, which I think should be made in this case.

Mr. Connor: That is a statement to the Jury. It is perfectly obvious what he did. It is highly improper.

The Court: We have passed that. We don't have to have any more discussion about it.

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Q. Do I understand your coffee break came two hours later, at 2 o'clock?

A. That's correct.

Q. You were relieved by Richards?

A. That's right.

Q. When you left the crow's nest for your coffee break, what did you observe about the lights in the radar tower?

A. The same light was on, but the other four lights were off.

Q. This light that was still on is the one you talk about at the level of the platform of the crow's nest?

A. That's correct.

Q. Let us talk about this light for a minute. In the part of the light that faces the crow's nest—do you follow me?

A. Which?

[fol. 25] Q. That back part of the light that faces the crow's nest, was that covered or exposed?

A. It was not exactly covered. Like if this is the light, it just covered from here to here. But still the light is shining down to the platform.

Q. In other words, to prevent the light from going into

the crow's nest, the back part of the light was covered with something?

A. Yes. Just only the forward.

Q. The forward part of the light would be the part that faces the crow's nest?

A. Correct.

Q. That part of the light which faced the ladder was open?

A. That's correct.

Q. It shone down on your platform?

A. Yes.

Q. That light was on when you left at 2 o'clock too?

A. That's correct.

Q. You went to your coffee break. What time did you come back?

A. I come back 2:30.

Q. When you came back at 2:30, what did you see about the lights then?

A. It was the same thing. In fact, I was going to report it to the bridge again to remind him about fixing it.

Mr. Connor: I move to strike out what his intentions were.

The Court: That may be stricken.

Mr. Connor: I ask the Jury to disregard it.

The Court: The Jury is instructed to disregard it.

Q. Was there a telephone in the crow's nest that was connected to the bridge?

A. Yes.

Q. Before the accident, this time at 2:30 a.m. in the morning. Tell us where you were when the light went out, et cetera.

A. I was climbing the ladder. You want me to start this way? It is better for me.

Q. Go ahead.

A. I climbed the ladder. Then when my foot reached it, the level of the platform, then I started to swing myself, and I put my left foot to the platform, and at the same

[fol. 26] time, when my foot is secure, then I put my left hand around the—what do you call this again?

Q. The casing.

A. The casing. So I lift my right foot and tried to cross it to the platform. That's when at this moment, between the platform and that ladder, when the light come off.

Q. That light on the platform level came out?

A. Yes. That one at the crow's nest level.

Q. While you were still swinging over?

A. With the right foot, yes.

Q. Was there any other light of any kind in this radar tower at that time?

A. No, no light.

Q. No light at all?

A. No.

Q. It was black?

A. Yes. I get scared.

Q. Tell us what happened.

A. I getting scared. Everything went black inside. I getting scared. The first thing for me to do is, I got to move away from that hole, because there was a hole behind me. I remember my face was facing forward.

Q. You mean towards the crow's nest.

A. To the crow's nest, yes. So I start to move my left foot to get in the middle, my left foot, and at the same time, just about the time before I moved my right foot—I didn't even move it yet—that's when I slipped and fall there.

Q. When you fell, what part of your body hit what part of the platform and what else happened?

A. From my foot to the lower of my back, I was laid down on the platform, and in this open hole, my half body was in the open hole. By the time I step in and I fall down—I am lucky—I was lucky enough. When I strike my head to the rear, at the same time I grabbed this ladder and I was lucky enough to hold it. That was the only one way to save me.

Q. Let's see if we can understand you more clearly. When you slipped you went backwards?

A. Yes.

Q. When you went back, you were with your back to the ladder you had just come up?

A. Yes. I struck my head.

[fol. 27] Q. So your head hit the ladder and you grabbed the rungs?

A. Not in the back. Right here (indicating). When I fall, I swing my face, but my face was hit, rather.

Q. You grabbed the rungs behind you?

A. Yes. I grabbed the rungs. I was lucky.

Q. You were looking straight up to the top of the tower?

A. Yes.

Q. Your lower back had hit the platform, the edge of the platform?

A. Yes. I remember that.

Q. When this happened, what occurred after that?

A. When this happened, the first thing I remember was the pain in my back. It shoot me, pain like a needle. I never seen pain like that. So every time I tried to put my weight in my hand just to move it, I screamed. Then I call for help.

Q. Did somebody answer you when you screamed for help?

A. Yes. Richie. He already opened the door.

Q. Were you able to see Richards?

A. No. I can't see him. Everything black.

Q. But you did hear him?

A. Oh, yes, I can hear his voice.

Q. What did he do?

A. So he asked me, "Where are you? Where are you?" I said, "Here, here."

So he already felt me. So he said, "Hold yourself. I am going to try to pull you up. I am going to help you. You got to help me, too."

Q. Where did he first pull you?

A. I believe he tried to pull me in my leg, but every time he tried to pull my leg, more pain hit me. Every time he touched my leg, more pain hit.

Q. So finally how did he get you onto the platform?

A. He grabbed me by hand.

Q. And pulled you up?

A. Yes, and he sat me down to the edge of the platform.

Q. Then what happened after that? What did he say to you and what did you say to him?

A. I will tell you, I start to get dizzy myself, you know. [fol. 28] But I remember what he talking at that time. I still remember. But he did ask me, "Can you hold yourself until I make a phone call?"

I said, "I don't know. Maybe. I don't know."

He started to repeat it about three or four times. I remember that. "Can you hold yourself?"

When I finally gave up, I said, "Yes, I guess so."

So he keep me down there and he went to make a phone call.

Q. What do you next remember?

A. What I next remember is I start to get more dizzy, and I feel my hand was getting weak. Then I keep calling him again. I said, "Richard, Richard, please, I am getting weak. I can't hold myself longer. I am getting weak, I am getting weak." Finally I feel myself to fall, and then I don't know.

Q. This is the last you remember?

A. This is the last I remember; and then I was in the hospital.

Q. Let's look at these photographs, particularly the third one. When Richards brought you to the platform, as you have described, where were you seated when he went in to make the phone call?

A. Here (indicating).

Q. Where you got the "X" and the name "Salem" appears?

A. Yes.

Q. And your feet, Mr. Salem?

A. My feet was laid down in that open hole.

Q. Your feet were dangling down in the hole?

A. Yes. With my arm he told me to hold something. I don't remember what I was holding.

Q. This radar cable enclosure?

A. I guess so.

Q. I have here, Mr. Salem, two statements they took of you that day, the 16th of February. It is dated that day. Is this your signature on the bottom of this one, Plaintiff's Exhibit 6?

A. I guess so.

Q. Is this your signature?

A. That is correct, yes.

[fol. 29] Q. Do you remember giving these statements on that day, yes or no?

A. Yes.

Q. You did?

A. Yes.

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Cross examination.

By Mr. Connor:

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Q. With your left foot on the ladder and your right foot on the ladder, you were holding on with both hands?

A. Of course, yes.

Q. What is the first movement you made? Was it with your left foot?

A. With my left foot, yes.

Q. What did you do with your left foot?

A. I put my left foot to the edge of the platform, and as soon as I saw my left foot is secured, I moved my left hand and I grabbed with my arm—what do you call this thing again?

Mr. Klonsky: Casing.

• • • • •

Q. And then with your left foot in the position which you have marked here and your left arm around the radar enclosure or casing, you say you took your right foot off the ladder?

A. That's right.

Q. Did you put your right foot to the starboard side of your left foot?

A. It was just about that time when the light come off.

Q. Is that where you were going to put it?

A. Yes.

Q. That is the place you always did it, the way you always did it?

A. Yes. That was the closest place, yes.

Q. Were you still holding on to the ladder at the time?

A. As soon as I removed my right foot, I released my left hand and I was holding with the right foot, but when I was moving my left foot one foot to be in a position to be in the middle, and which my face was forward, this was the time I completely released my right hand with what you call that. My hand was already released.

[fol. 30] Q. Your hand was on the ladder when you released it?

A. Not the ladder. What do you call that?

Mr. Klonsky: The casing.

The Witness: The casing.

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Q. I am talking now about the time of your accident. Do you understand that?

A. Yes.

Q. I saw that after the light went out, you had your both feet on the platform.

A. That's correct.

Q. At that time were you facing towards the doorway to the crow's nest?

A. It wasn't exactly facing to the door. Just like I told you before, I was half—what do you call this? I was half to the starboard and half to the forward, but more to the forward.

Q. At that time and before you fell, did you have your hands along your sides?

A. Before I fall?

Q. Yes.

A. You don't make it too clear to me.

The Court: Where were your hands when you fell?

Q. Where were your hands before you fell?

A. Just like this (indicating).

Q. Hanging along your sides?

A. Yes.

Q. Both hands?

A. Yes.

Q. You were not holding on to that radar casing?

A. I already moved from it.

Q. You were not holding on to it?

A. No.

Q. Then I understand the next thing you did was to take one step forward towards the crow's nest, and then that is the time that you fell?

A. No. I already moved one foot before that.

Q. You already had gone one foot towards the crow's nest?

A. Not to the crow's nest. To the side; to the middle.

Q. To the middle?

A. Yes.

[fol. 31] Q. Was that step that you took forward towards the crow's nest?

A. That's after I take the step with the left foot, and at that time I remember I was in the middle. That's the time I slipped.

Q. In the middle of the platform?

A. Yes.

Q. As you stood in that position in the middle of the platform, if you had extended your hands on each side, you could have touched each side of the area or the radar tower, could you not?

A. I tried to.

Q. I say you could do it.

A. I could, but I don't have the time yet to grab it.

Q. I am talking about after the lights went out.

A. Yes.

Q. You had your feet on the platform.

A. Yes.

Q. If you had at that moment put your hands out to each side, each hand, you could have touched the radar tower?

A. It is dark. You got to feel it. It is completely dark. You got to feel it first.

Q. That's all right. You could feel it.

A. By feeling it, of course, that takes time.

Q. All you had to do, I say, if you wanted to take hold

of the sides of the radar tower would be to extend your arms away from your body; is that true?

A. Which way? Even if you tried to do what you had in your mind, to hold up on top—I got something for me especially. Do you know how long this is (indicating)?

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Q. All I am trying to find out is, if you could have put your hands out, you could have touched each side of the radar tower.

A. I am not too sure.

Q. How wide is the radar tower at that place?

A. From wall to wall? I think about four foot. I think about that.

Q. Is the radar tower widest at that place, or is it the narrowest at that place?

A. The one I am talking about, starboard and port.

Q. What we call athwartship. Do you know what I mean by that?

A. No.

[fol. 32] Q. In other words, from the port side of the radar tower to the starboard side, you say that is about four feet?

A. Just about that.

Q. You never measured it, I take it.

A. No. That's my close guess.

Q. How tall are you?

A. Five feet six.

Q. Do you know how far you could extend your hands from your body? In other words, the distance from the tips of one hand to the tips of the other?

A. Like this, a fathom.

Q. How far would you say that is?

Mr. Klonsky: I think it is obvious to the Jury.

Mr. Connor: Do you want to concede how far he shows?

The Witness: I want to get you clear.

Mr. Klonsky: We are trying to get clear on figures and dimensions.

The Court: I should think you have somewhere an exhibit already in evidence the size of that tower.

Mr. Connor: We do. It is 36 inches at its narrowest place.

The Court: Then what are we talking about the width of his arms for?

Mr. Connor: This is cross examination.

The Court: I know, but you are not going to get anything helpful from him on that subject. Just take a look.

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Q. Do you see this stiffener that I point to that runs around the edge on the inside?

A. Yes.

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Q. You see that?

A. Yes.

Q. Would you give me an estimate how far above the level of the crow's nest that is?

A. You mean from the platform?

[fol. 33] Q. Tell me this. Where on you did that stiffener come? What part of your body did it come up to?

A. Where I am when I was standing on the platform?

Q. Yes.

A. I was almost in the middle, right here.

Q. Where on your body, how far up on your body, did this stiffener come that I point to?

A. You mean how high from my body?

Q. Yes. I think it comes up to my shoulder. I think.

Q. That is your best recollection?

A. Yes.

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Mr. Connor: I think so.

I think it is contended that there was no claim made that the ladder was in any wise defective.

Mr. Klonsky: That's true.

Q. In your work on that ship you would step from that ladder about four times a day, isn't that so?

A. That's correct.

Q. You would also step from the platform to the ladder another four times a day?

A. From the platform to the ladder or from the ladder to the platform?

Q. From the platform to the ladder.

A. That's correct.

Q. You have been doing that work and going into that area for about four or five months, anyway, hadn't you?

A. It was more.

Q. How much more?

A. I would say close to a year.

Q. Except for vacations, you would be doing that all those times for that period of a year?

A. In the vacation?

Q. Except for vacations.

A. Yes.

Q. In the daytime, when you opened the door to the crow's nest, you would get the sunlight to come into that area, isn't that true?

A. No.

Q. I want to be sure I understand you. You say that when the door leading into the crow's nest was opened in the daytime, that no light would come into that area?

A. In the daytime?

Q. Yes.

A. If the door is open?

[fol. 34] Q. Yes.

A. Just a little bit. It comes only from the glass, because the top is closed. It is just a little bit that comes from the glass. That's at daytime, a little bit, just close to the door.

Q. You never slipped before on that platform?

A. No, but I have been careful.

Mr. Connor: I move to strike out everything after "no."

The Court: It is stricken.

Q. You never had any trouble before stepping from the ladder to the platform?

Mr. Klonsky: I object to that. That is a vague word, "trouble."

The Court: Yes.

Q. You never had any difficulty stepping from the ladder to the platform before?

A. I just repeated it. We have to be extra careful.

Q. You have to be careful?

A. Extra careful.

Q. You are used to going to sea for years, aren't you?

A. I have been going to sea since 1936.

Q. You have to learn to walk with the roll of the ship, don't you?

A. Yes.

Q. On board you have to be careful when you are climbing ladders, don't you?

A. If you have some safety places while the ship has been rolling, yes. But in this particular close distance, there is nothing to hold on.

Mr. Connor: I move to strike that.

Mr. Klonsky: He asked for it, your Honor.

The Court: I don't think so. It is stricken. This poor man is not only a layman, but he has some difficulty with the language. He is trying to be helpful.

Mr. Connor: I must confess, your Honor, I can't quite agree with that. I have been through this before.

The Court: That's all right. That's the way it looks to me.

[fol. 35] Q. As a seaman, it is part of your job to climb up and down straight ladders, isn't it?

A. That's correct.

Q. Sometimes you have to climb 30 and 40 feet of a straight ladder?

A. That's correct.

Q. Sometimes you have to do that when it is raining or snowing?

A. That's correct.

Q. You have to do it sometimes when the ship is rolling very much?

A. Yes; even if it is snowing, yes. But when you get something to hold—

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Redirect examination.

By Mr. Klonsky:

Q. Mr. Salem, at any time during your experience at sea, particularly on the S.S. *United States*, did you ever

have to climb a thirty-foot ladder and step onto a smooth platform where there was absolutely no light available?

A. No, nothing.

Mr. Connor: Objection.

Mr. Klonsky: He asked him about past experience. I am asking him if he had one like this.

The Court: I think that is proper.

Mr. Connor: I object to it, your Honor. It is not a question. It is leading and suggestive and it is a summation, really.

The Court: Overruled.

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LESLIE BARTON, called as a witness by the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Connor:

Q. Mr. Barton, you are employed on the Steamship *United States*?

A. That is correct, sir.

[fol. 36] Q. You are here under a subpoena, are you?

A. That's correct.

Q. What is your job on the *United States*?

A. I am employed as chief quartermaster of the S.S. *United States*.

Q. What are your duties as chief quartermaster?

A. As chief quartermaster I am in charge of the quartermasters, of which there are six; the maintenance of the bridge and its equipment; assistant to the navigation officer; and I steer the ship in and out of port.

Q. That is what quartermaster means, a wheelsman?

A. That's correct. It is a name from the old days in which the steering was done on the quarterdeck, and he was master of the quarterdeck.

Q. What duties do you have, if any, in connection with the radar tower?

A. None whatsoever, with the exception of repairing any

flag halyards or blocks attached to the radar tower for signalling purposes.

Q. Do you make any inspections of the radar tower?

A. None, except during the day when I am on duty I have been instructed by the navigating officer to see that everything is in order in that area.

Q. Does that include the lights in the radar tower?

A. That's correct.

Q. Do you make a daily inspection of the lights?

A. Approximately 8 a.m., when I turn to in the morning, and 5 p.m., before I knock off.

Q. What if any duty do you have in relation to these lights if any of them are burned out?

A. If I discover one of the lights is out, I report it either to my immediate superior, the navigating officer, who will take action, or failing his presence, I take it upon myself perhaps to call the chief electrician.

Q. Do you have any supervision of the men who stand lookout on the *United States*?

A. None whatsoever.

Q. Was there a time when you reported the lights in the radar tower to one of the ship's electricians?

A. Yes.

[fol. 37] Q. Do you remember about when that was?

A. I believe that was some time in the middle of February in 1958.

Q. You are familiar with the fact that Mr. Salem—

A. I am, yes.

Q. He was on the radar tower on February 16th and had to be taken out? A. Yes, sir.

Q. Was this that you are speaking of in the middle of February before Mr. Salem or after?

A. Approximately six days previous to the accident.

Q. Did you have a conversation with one of the electricians?

A. I informed him that—

Q. Don't tell us what you said. Tell me whether you did have a conversation.

A. Yes, I did.

Q. Do you remember which of the electricians it was you spoke to?

A. I believe it was the chief electrician, D'Andrea.

Q. Did you make any inspection of the lights in the radar tower that same day with one of the ship's assistant electricians?

Mr. Klonsky: Which day?

Mr. Connor: This day six days before the accident.

A. Before the accident?

Q. Yes.

A. Yes, I did.

Q. Did you observe him do anything to the lights?

A. I did.

Q. What did he do?

A. There were three bulbs burned out which he replaced and he checked all the sockets and the circuits in that particular area and checked the switch plan that controls those lights and found nothing wrong.

Mr. Klonsky: I object to that. What somebody else checked and found is for that person to testify.

The Court: Yes. That may be stricken. The Jury is instructed to disregard it.

Q. Did you remain while the switch was operated?

A. I was in his presence.

[fol. 38] Q. What was the result of the operation of the switch? Did the lights light or not?

A. They did, sir.

Q. Following that date, did you have any further reports from anyone in respect of the condition of the lights in the radar tower?

A. None to me, sir.

Q. During your inspections following that, what condition did you find the lights in when you inspected it in the morning and in the afternoon?

A. To the best of my knowledge, they were burning brightly.

Q. All the lights or only some of them?

A. All the lights.

Q. How many lights are there in that tower?

A. There are five, sir.

Q. Does that include the two lights above the crow's nest?

A. Yes, sir. There are five in a straight row looking upward.

The Court: I don't know what a witness means when he says "to the best of my knowledge." I don't know whether he has any knowledge on the subject or whether he hasn't.

Q. When you say to the best of your knowledge, do you mean to the best of your recollection?

Mr. Klonsky: I think this is telling him what to say.

The Court: When you said to the best of your knowledge, what do you mean?

The Witness: I'm sorry, but I forgot what the question was that I answered.

The Court: Go ahead.

Q. What you were answering was a question with respect to what you found when you inspected the lights in the radar tower following the time you observed the assistant electrician replace sockets.

A. Your question was were the lights burning?

[fol. 39] Q. My question was what did you find with respect to whether the lights were lit or not on your daily inspections.

A. The lights were burning.

Q. That includes all five?

A. All five, sir.

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JAMES D'ANDREA, called as a witness by the Defendant, having been first duly sworn, testified as follows:

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Direct examination.

By Mr. Connor:

Q. What is your business?

A. I am a marine engineer.

Q. What licenses, if any, do you hold issued by the United States Coast Guard?

A. First assistant engineer-steam and third assistant-Diesel.

Q. Is that limited or unlimited license?

A. Unlimited.

Q. What is your job on the Steamship *United States*?

A. I am the third assistant engineer, assistant to the chief electrician.

Q. How many electricians are there on the Steamship *United States*, or were in this voyage in February, 1953?

A. We have 12 unlicensed electricians and two of us as engineers are in the electrical department.

Q. How are the electricians divided up? Do they all stand regular watches, or how is it done?

A. We have six men that stand regular watches—three in the forward end of the ship and three in the after end of the ship, on separate watches around the clock; six men on day work maintenance, and three of them are assigned primarily to just lamping up the ship on different deck levels.

Q. Will you tell us what you mean by lamping up the ship?

A. Installing burned out light bulbs and replacing them as such, and going around from stateroom to stateroom on all quarters of the ship and areas of the ship. As lamps [fol. 40] are burned out, these men are primarily assigned to lamping up the ship.

Q. How many bulbs do you use a voyage?

Mr. Klonsky: I object to that. We are concerned with one bulb at the right place.

The Court: Sustained.

Mr. Connor: I object to that. I think I have a right to show what the situation is on the ship.

The Court: I don't think how many bulbs they use on a ship advances anything.

Mr. Connor: It does advance my defense, if your Honor please. I have to make a comparison between a ship and a home. Most of us are familiar with bulbs burning out

in a home and I want to show the difference between a ship bulb and a home bulb.

The Court: Overruled.

How many bulbs do you use on a ship on one voyage?

The Witness: Approximately 500 to 600 a day, and that's on an average voyage for either 11 or 12 to 15 or 16 days.

Q. What size bulbs do you have on a ship?

A. All sizes.

Q. Beginning with what and ending with what?

A. From seven and a half watt or even from six watt up to a 2,000 watt lamp. Those that are used every day are mostly from six and a half watt to 150.

Q. How many bulbs do you carry normally on a voyage, that is, spare bulbs?

A. It is hard to say. It isn't hard to say, really. It would take a little while to figure it out.

The Court: I don't think that is necessary.

Mr. Klonsky: I object to it anyhow, your Honor.

The Court: Objection sustained.

Mr. Connor: May I state why I asked the question?

[fol. 41] The Court: No.

Mr. Klonsky: He is comparing it to a house again, your Honor. I don't think that is proper.

The Court: I don't think this is advancing your defense very much. You are indicating you are having a lot of trouble with your lights.

Mr. Connor: I object to your Honor's statement and I ask your Honor to withdraw that from the Jury.

The Court: I will comment on it, as I am entitled to comment on it, and I will charge the Jury at the proper time about it.

Mr. Connor: I respectfully except.

The Court: You may have it.

Mr. Connor: I think I have a right to show that we had an adequate supply of bulbs.

The Court: You can ask him that.

Q. Would you please answer the question—

The Court: Is there any claim here they ran out of bulbs?

Mr. Klonsky: There is not, your Honor. I never claimed it.

Mr. Connor: Then there is no need for the question.

Q. Did there come a time when your attention was called to the lights in the radar tower on the Steamship *United States* in February of 1958?

A. In the early part of February.

Q. Do you remember who it was who called your attention to it or spoke to you about it?

A. The normal procedure is—

Q. Don't tell us normally.

A. Someone possibly from the bridge, then.

Q. You don't remember who?

A. Not now.

[fol. 42] Q. Did you assign anybody to look into the complaint?

A. Definitely.

Q. Whom did you assign?

A. I assigned the man stationed in that area, for that part of the ship, to check the circuits out, and so forth and so on, to see what might be causing lamps to burn out, and as a precautionary measure, we renewed two sockets in the radar tower previous to this accident.

Q. The one to Mr. Salem?

A. Yes.

Q. Do you know who actually performed the work of making the renewals?

A. Yes, a gentleman by the name of Antonio Rivas.

Q. What bulbs, what kind, do you use? How are they specified, if you know?

A. You mean throughout the ship?

Q. Yes.

The Court: You mean who is the manufacturer?

Mr. Connor: I am talking about the quality of the bulbs used.

The Witness: Normal household quality—Mazda lamps, General Electric.

Q. Do you know how it comes about you use those lights?

A. They have always been supplied on the vessel.

Q. Have they been specified by anybody?

A. No, not to my knowledge, except that they call for a certain size lamp, an A-19, and that is in the specifications and on the blueprints of the manufacturers.

Q. Whose blueprints?

A. The designers, Gibbs & Cox.

Q. That is the firm which designed the *United States*?

A. Yes.

Q. Subsequent to the occasion when you had Mr. Rivas make the inspection of the wiring in the radar tower, did you receive any further complaint with respect to the lights in the radar tower up to the time of Mr. Salem's accident?

Mr. Klonsky: I object to that. I don't think it is germane whether this man received complaints or not, unless it be [fol. 43] shown first he is the only one who would get complaints or complaints in the normal course would come to him.

The Court: This is part of his job.

Is it part of your job to receive complaints about the lighting?

The Witness: Definitely, yes.

The Court: That's all right.

Q. You may answer that question.

A. Would you please repeat it?

Mr. Connor: May we have the reporter read it?

The Court: It will save time if you repeat it.

Q. After Mr. Rivas had done this repair work in the radar tower with respect to the wiring, did you receive any further complaints about the lights in the radar tower?

A. No, I don't recall.

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Q. During the hours from midnight to four in the morning, are there any electricians on duty on the ship?

A. Yes. There are electricians on duty in the engine room, on watch.

Q. Are there always electricians on duty in the engine room?

A. Always.

Q. Throughout the 24 hours?

A. In port and at sea.

Mr. Connor: That is all.

Cross examination.

By Mr. Klonsky:

Q. These electricians in the engine room, they are concerned with the electrical equipment necessary for the running of the vessel; isn't that true?

A. Yes.

Q. They are not concerned down in the engine room with replacing light bulbs, are they?

A. They are subject to going anywhere.

[fol. 44] Q. It is during the daylight hours you have these roving lampmen. That's when these light bulbs are put in; isn't that true?

Right.

Q. Your electricians down in the engine room are concerned with much more serious business.

A. They put lamps down there, too.

Q. But in the engine room?

A. Yes.

.

Q. You are familiar with the fact, sir, are you not, that the S.S. *United States*, with its speed and with its construction, was subject to a great deal of vibration?

A. No, sir, I wouldn't say so.

Q. Would you say that the radar tower, projecting as it does above the bridge deck straight upwards for over 60 feet, was itself subject to vibration as the vessel plowed in the winter sea?

A. At times, possibly yes.

Q. At times did that affect the wiring?

A. Not the wiring, no.

Redirect examination.

By Mr. Connor:

Q. Mr. D'Andrea, when you replaced these three bulbs that were burned out, did the bulbs light up?

A. They did.

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Recross examination.

By Mr. Klonsky:

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Q. I wanted you to testify about what you know and what you said in this statement when you went to look at the radar tower. I asked you when you look at light sockets, isn't the primary cause of renewal the wiring failure?

A. No, there was nothing wrong with the wiring.

Q. Let me ask you this: is there any part of the vessel of the S.S. *United States* that is more subject to vibration while the vessel is plowing the seas than the radar tower?

A. Yes.

Q. What else?

A. The stern of the ship.

[fol. 45] Q. Is that where you have a watch elevated above the deck?

A. I don't know. I don't think so.

Q. This is an elevation of about 60 feet up from the top-most deck, isn't it?

A. You asked me about vibration. I only answered about vibration.

Q. You say that the stern of the ship has more vibration than the forward part of the ship, right?

A. Right.

Q. But when you take the radar tower, which is like a reed standing upward 60 feet into the air in a winter sea, is it not true sir, that this radar tower, because of its position and height and extension upwards, would be more subject to the vibration of the vessel plowing with its forward part than the stern of the ship?

A. I don't think so.

Mr. Connor: Objection. There is no evidence about this.
The Court: The objection is overruled.

Q. You don't think so?

A. No.

Q. You are not sure, are you?

A. No.

Q. But I do ask this question: in your opinion, sir, and I am taking a chance in asking you this, should the S.S. *United States*, in February of 1958, while the vessel was proceeding at top speed, in rough sea, west northwesterly with passing rain squalls, going seven degrees to port and six degrees to starboard, have had rough service bulbs in the radar tower?

A. I wouldn't say so.

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ANTONIO RIVAS, called as a witness by the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Connor:

Q. What is your business?

A. You mean my job?

Q. Yes.

A. Second electrician aboard the S.S. *United States*.

[fol. 46] For how long have you had that job?

A. Five years.

Q. You are here under subpoena?

A. Yes, sir.

.

The Court: I think that was done with all your witnesses.

Mr. Connor: Yes, your Honor. They were all subpoenaed. If that statement will be acceptable, I won't mention it again.

Q. You were on the Steamship *United States* in February, 1958, Mr. Rivas, as electrician?

A. Yes, sir.

Q. What were your duties as electrician or assistant electrician?

A. My duties are to take care of the promenade deck, sun deck, sports deck, and the navigator room deck.

Q. What do you mean by taking care of the deck?

A. I have to take care of the equipment, the electrical equipment, which includes lights, fans, and so forth.

Q. Part of your duties are the replacing of bulbs that are burned out?

A. Most of the times, yes sir.

Q. You mean that is what you do most of the time?

A. Yes, sir.

Q. Some time on February 10, 1958 did you receive any orders from Mr. D'Andrea with respect to the lights in the radar tower?

A. Yes, sir.

Q. As a result of those orders did you make any inspection of the lights and the wiring in the radar tower?

A. Yes, sir.

Q. Will you tell us what inspection you made and what if anything you did?

A. Mr. D'Andrea sent me to the radar tower to see what was wrong with the lights. So I went over there and I found the man that is supposed to check the lights every day, which is the chief quartermaster, Barton. I asked him what happened to the lights. He says to me that the two bottom lights were going off and on too often. So the first thing I did was just replace the two sockets.

[fol. 47] Q. What was the condition of the two sockets which you replaced?

A. For me, they were all right. But according to what the chief quartermaster told me, I figured that something might be wrong with the sockets. That is why I changed them.

Q. Did you install new sockets?

A. Yes, sir.

Q. Did you check the wiring that led from the switch to the sockets?

A. Yes. I took readings from the circuits and it said one megger and a half.

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Q. In any event, this is something that measures resistance of electricity?

A. It measures resistance through the insulation.

Q. What can you find out by doing that?

A. That means that the instrument is not touching the ground.

Q. In other words, the circuit is not grounded?

A. That's right. It is not touching the steel of the ship.

The Court: Another way to say that is the line isn't shorted anywhere.

The Witness: A short is different. A short is two wires together.

The Court: A wire against the steel of the ship?

The Witness: This is a wire against the steel. It may cause the lights to go out completely; maybe not completely, but a leakage.

Q. After you had replaced these two sockets—which two sockets did you replace?

A. The two from the bottom.

Q. After you had done that, did you put new bulbs in or did you put the old bulbs in?

A. That's the order we have. Any time one bulb goes out, our orders from the chief electrician was to replace every one of them.

• • • • • • •

[fol. 48] Cross examination.

By Mr. Klonsky:

Q. Before you renewed the two light sockets on February 10, 1958, did you take a Megger reading of the sockets that then were there?

A. No, sir.

Q. As far as you could see, was there anything wrong with those two sockets?

A. I didn't see nothing wrong with those two sockets.

Q. But you replace them anyway?

A. Naturally.

Q. Because you were told the lights were going out with those sockets?

A. That's right.

Q. So for all you know, the condition before you changed the sockets was the same as you changed it after?

Mr. Connor: I object to that. That is argumentative.

The Court: I don't think so. Overruled.

Q. Did you hear what I asked you?

A. What was the question?

Q. As far as you know, the condition of those sockets before you replaced them was the same as the socket you replaced them with?

A. I don't know. I can't answer that, because maybe there was something wrong before and nothing wrong after.

Q. Before you renewed the sockets, did you put a new light bulb in?

A. Yes.

Q. Did it go on?

A. Yes.

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Redirected examination.

By Mr. Connor:

Q. Do you have any duty in connection with the lights in the radar tower besides making repairs? In other words, do you check those lights?

A. Yes.

Mr. Klonsky: What was that question?

The Court: He asked him if he had any duty to inspect the lights in the radar tower. His answer was yes.

[fol. 49] Q. How often did you inspect them?

A. I checked them twice the trip—one day after New York to Europe and one day after leaving to New York.

Q. Does that include checking whether the lights are burning or not?

A. Yes, sir.

Q. On this particular trip do you know whether or not the lights were burning on the two occasions of your inspection?

A. On this particular trip the lights were on, because they all have to be.

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VINCENT MCGHEE, called as a witness by the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Connor:

Q. Mr. McGhee, you are a member of the crew of the Steamship *United States*?

A. Yes.

Q. What is your job?

A. I am the boatswain.

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Q. Were you a member of the crew of the vessel when she was in drydock on December 23, 1957?

A. Yes, sir. I have been at every drydocking.

Q. In connection with the drydocking at that time, did you have any duties in connection with ship repairs or maintenance?

A. In the drydock?

Q. Yes.

A. Yes.

Q. Was any work done in the radar tower under your supervision?

A. Yes. It was painted.

Q. Did you make any record of the date that it was painted?

A. Yes, sir.

Q. Let me show you this book, Mr. McGhee, and ask you whether or not this book is in your handwriting.

A. Yes, it is my handwriting.

Q. This is a book that you keep?

A. It is my own.

Q. It is your own personal record?

A. Yes.

[fol. 50] Q. Did you make any entry in that book in respect

of whether or not the inside of the radar tower was painted out?

A. Yes, I did (indicating).

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Q. What surfaces on the interior of the radar tower were painted on that occasion?

A. You mean the material the radar tower is made from?

The Court: What surfaces.

The Witness: It is just aluminum paint.

Q. What surfaces were painted?

A. Pardon?

Q. What surfaces of the radar tower were painted? Did you paint the sides or the girder?

A. The entire inside was painted.

Q. Does that include the platforms?

A. Yes.

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RICHARD W. RIDINGTON, called as a witness by the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Connor:

Q. Are you a licensed marine officer?

A. Yes, sir, I am.

Q. What licenses do you hold?

A. Master.

Q. Is that a license issued by the United States Coast Guard?

A. Yes, sir.

Q. That entitles you to be captain of a vessel of any tonnage in any ocean in the world?

A. Yes, sir.

Q. What is your connection with the Steamship *United States*?

Mr. Klonsky: Why don't you ask what it was in February?

Mr. Connor: I want to be a little more general now, if I may.

The Court: Go ahead.

[fol. 51] Q. Answer that question.

A. My permanent job there is chief officer. However I do relieve as executive officer.

Q. Is executive officer a higher rating on the ship?

A. Yes. It is next in line.

Q. In other words, you first have the master and then you have the executive officer and then the chief officer?

A. Yes.

Q. You occasionally sail as executive officer?

A. Yes.

Q. Next to the captain?

A. Yes, sir.

Q. How long a time have you been on the Steamship *United States*?

A. Since the maiden voyage.

Q. You have been on it continuously, have you, since that time, except for vacation periods?

A. Yes, sir, except for vacation periods.

Q. How long a period of time is that, Mr. Ridington?

A. Nine and a half years. Eight and a half, excuse me.

Q. Mr. Ridington, are you familiar with the duties of lookout on the *United States*?

A. Yes, sir.

Q. What are his duties?

A. The lookout on any ship, his job is to report to the bridge anything at all that he sees.

Q. In respect to the *United States*, a lookout stands his watch always in the radar tower, in the crow's nest?

A. In the crow's nest, yes, sir.

Q. What if any duty does he have in respect of the conditions in the crow's nest or in the radar tower?

A. He should report it. If there is anything wrong, he should report it to the bridge. He has to go by the bridge on his way up or down.

Q. There is a telephone connected to the bridge and the radar tower?

A. Yes, sir.

Q. Was there in February of 1958?

A. There always has been, yes.

Q. In connection with your duties either as executive officer or chief officer, do you preside at or attend safety meetings on board the vessel?

A. Yes, both. When I am executive officer I preside. When I am chief officer, I attend.

[fol. 52] Q. During the eight and a half years that you have been an officer on the vessel, did there ever come to your knowledge an accident in the radar tower, at the level of the crow's nest?

Mr. Klonsky: In the ten years?

4 Mr. Connor: The eight and a half years.

Mr. Klonsky: I object to that, whether anybody else had an accident. I don't believe that is material.

Mr. Connor: We have recited some cases supporting that, your Honor.

The Court: Objection overruled.

A. Outside of Salem's accident, there has been none other.

Mr. Klonsky: I press my objection and ask that it be stricken. I believe that is immaterial, because the circumstances are different. Unless he says the circumstances are the same, with all the lights out, without skidproof paint, with the vessel rolling in the sea, then it might be germane. But merely to say there is no record previously is not correct. Anything I don't have a right to ask about afterwards I don't think is fair and proper.

The Court: I don't think it is fair, and it isn't fair, and it is improper in this sense. I believe it is incompetent. Your objection to it will go to its weight.

Mr. Connor: That is all.

Cross examination.

By Mr. Klonsky:

Q. In the eight and a half years that you had been chief officer and at times executive officer, did you ever have advices that all the lights within the radar tower had gone out at the same time?

A. No, sir; outside of the night that Salem was supposed to have had his accident.

Q. But you do know as a matter of course, based upon your function as chief officer and the investigation you performed [fol. 53] formed in the regular course of business, that Mr. Salem's accident did occur with all the lights out?

A. That was my understanding.

Q. Considering the structure itself, an aluminum chimney with a cover, no outside light except what can be gotten from the bulbs inside, with all the lights out, you being an experienced mariner, sitting at safety meetings, would you say it was a safe or unsafe condition for a man to be moving from the ladder to the platform and from the platform into the crow's nest with all the lights out? Is that safe or unsafe?

Mr. Connor: I object to that. I think it is the question your Honor is going to submit to the Jury.

The Court: That has also a conclusion that an expert mariner is entitled to tell us about. The objection is overruled.

Q. Did you understand my question?

The Court: Read the question to him.

(Question read.)

A. I would say it would be an unsafe thing to attempt.

Q. Have you, yourself, ever gone up to the lookout tower?

A. Many times.

Q. There is a telephone, is there not, within the crow's nest?

A. That's right.

Q. The telephone is right adjacent to the door itself?

A. It is behind the door, when the door is swung open.

Q. Can you reach into the telephone while standing on the platform before getting into the crow's nest?

A. I would say no, because the door is there.

Q. When you would open the door?

A. But the door swings back against the telephone.

The Court: He would have to get his arms around the door.

[fol. 54] Q. Are you sure that is where it is?

A. That is my recollection.

Q. You could be wrong?

A. I could be.

Mr. Connor: I say that that is not so.

Mr. Klonsky: That's right. The telephone is on the other side.

The Court: You agree about that?

Mr. Connor: I agree that the door does not cover over the telephone.

The Court: Very well.

Q. Isn't there another means of giving warning in case of an emergency, a button device, other than the telephone?

A. No.

Q. You don't press a button in case of an alarm?

A. No.

Q. Just the telephone?

A. Yes.

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Q. Are there places on board the ship where a seaman is required to proceed without the help of light?

Mr. Klonsky: I object to that. He has already testified with respect to this place, that this was an unsafe place.

Mr. Connor: I object to any speeches.

Mr. Klonsky: I am giving a reason for my objection.

The Court: Any other places, Mr. Connor, would be wholly immaterial. I suppose there are some nooks and crannies in the ship where you could find a dark corner.

Mr. Connor: I am talking about routine duties.

The Court: I think it is immaterial if it is any situation other than the one involved in this lawsuit.

[fol. 55] CHARLES FERRILL BOYER, called as a witness by the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Connor:

Q. Are you connected with the Steamship *United States*?

A. Yes, I am.

Q. Was it part of your duty to obtain statements from crew members if there are accidents?

A. That's correct.

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Q. In connection with your duties, did you take a statement from Mr. Salem on or about February 16, 1958?

A. I did.

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Q. What happened when you went to see Mr. Salem?

A. I went down. He was in the hospital. I took his statement.

Q. How did you go about it? Did you ask him questions or what?

A. I asked him to tell me how it happened, and I wrote it down as close as I could as to what he told me happened. Then when I finished I read the statement back over to him. Then when I typed up the final copy, I brought it back down to him and read it over to him and asked him to read it and then asked him to sign it, which he did.

Q. During that time did you have any difficulty in obtaining the statement from Mr. Salem or conversing with him?

A. No.

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Cross examination.

By Mr. Klonsky:

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Q. Which has entries commencing from the time he was rescued in the radar tower and brought to the hospital. I read these items to you to refresh your recollection as to

his condition at the time you came to see him: that they gave him medication, M/S one-half grain, STAT, and luminal grains two; brought down by stretcher. Trendelen-[fol. 56] berg traction 15 pounds for both legs. Intravenous 5% Q.W. (500 cc) running. Pain on motion; APC; he had no sensation of urinating; 500 cc clear of urine; severe pain with movements of the ship but mentally clear; still no sense of feeling in right leg; moved toe slightly on right foot; both feeling and motion left foot and leg; taking sips of H₂O; methiolate to abrasion on left side of forehead; left shoulder hurts; they gave him Demerol, 100 mgs; Demerol again; rise in blood pressure; became somewhat confused at about 7; pain, hammering in head; very dark areas around nose and eyes.

Does this refresh your recollection as to his condition when you took his statement?

A. I don't understand what you mean.

Q. Was he without pain? Was he rational? Was he able to be attentive? Did he talk to you clearly? That is what I mean with respect to his condition at the time you took his statement.

Mr. Connor: I object, as to whether or not an individual had pain or not. He is not a doctor.

The Court: It is subjective.

Mr. Klonsky: But it still could be apparent.

Mr. Connor: I have no objection as to whether or not the man was mentally clear from what he observed, but I don't think he could be expected to understand medical terms.

The Court: The question doesn't contain any medical terms.

What he is really getting at, Mr. Boyer, is, you took a statement from the man. You must have looked at him. Didn't you?

The Witness: Yes.

The Court: Did you see any of the things mentioned in this medical report, from your own observation?

The Witness: All I can say is that in my opinion I thought he understood what I was writing down for him. [fol. 57] I asked him to tell it to me as it happened, and that is just what I told.

FRANCIS RICHARDS, called as a witness by the Défendant, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Connor:

Q. Mr. Richards, are you a member of the crew of the Steamship *United States*?

A. Yes.

Q. In what capacity?

A. Able seaman.

Q. Were you able seaman in February, 1958?

A. Yes.

• • • • •

Q. Do you remember on February 16, 1958 that you relieved Mr. Salem, the lookout, at about 2 o'clock?

A. Correct.

Q. Do you remember that about a half hour later you heard Mr. Salem cry out?

A. When I was in the lookout and my relief was coming up, I heard him on the platform outside the door, through the door. He swore. He said, "Damn, that light went out." I opened the door and I heard noise. I didn't see anything. Then I heard him calling for help. So I asked him where he is. So he didn't answer me, only he said, "Help me, help me." Since I didn't see him, I tried to feel where he is, because it was completely dark over there, and I feel a leg. I touched his leg. So then I go outside— I go inside rather, and try and pull him by the leg. When I tried to pull him by the leg, he started screaming, "It's my back." Then I have to put his leg back on the platform and I told him to give me his hand, if he can, to pull him up on the platform. So he stretched his arm and I stretched mine from the platform and we reached each other's hand and I pulled him up. He, of course, I believe helped at the same time, because he was below that platform, and he winged to the starboard side, on the platform.

[fol. 58] Then I go on the ladder inside the hall, because his legs were down. I get his legs across the platform, and then I put his arm around, like there is cable protections

running up and down. I told him I have to make a telephone call to get help, because I cannot do it. I was on the ladder at that time. So he seems he didn't answer first. I say, "Are you all right?" And he said, "All right. Go ahead and call." So I went.

When I went to make that call, as soon as I heard the answer down from the bridge, I heard again, "Help," calling for help. So I didn't complete the call. I run out to see where he is. When I feel on that platform, he wasn't there. So then I told him to hang on and I am going to complete that telephone call for help.

Then somebody answered on the bridge. Somebody answered the telephone and I told him to bring some light and in a hurry. I go outside and tried to encourage him until help come, because I didn't know where he was and what position and in the dark I was afraid to climb down because I could step on his hand or on his head and cause his fall all the way down. Then Mr. Gregware, the head officer on the *United States*, came with a flashlight and he put that light up, and I saw his position about eight feet below that top platform, where he was. I run down and hold him until Mr. Gregware come up and we pulled him up on the platform.

Q. The entrance to the crow's nest is on the forward side of that compartment is it not?

A. Yes.

Q. Where is the telephone located in the crow's nest?

A. If you are facing front, on the left side, on the left hand.

Q. That would be on the port side?

A. On the port side.

Q. How far in from the door or the door jamb is the telephone?

A. I didn't measure. Only about two feet, more or less.

Q. In order to get into the crow's nest, do you have to climb over a high sill?

A. I don't know. A foot and a half or two feet. I don't know.

[fol. 59] Q. What about the overhead, the top of the door? How high is that off the deck?

A. The top opening?

Q. Yes.

A. About four feet, complete.

Q. The complete opening?

A. Well, the opening itself would be around three feet.

Q. In order to get into the crow's nest, then, you would have to step over the high sill?

A. That's right.

Q. And then you would have to bend down in order to get in?

A. That's correct.

Q. Then you say the telephone is about two feet away from the edge?

A. I didn't measure. That's only my rough guess.

• • • • •

Q. Before you went to telephone, you said you asked Mr. Salem whether he was all right?

A. Yes; and besides, I didn't want to move him from that place, to move him in a safe position, because that place he was on was the edge. Salem wouldn't let me touch him. Since I know his back was hurt, because he called in the darkness his back, I was afraid to touch him, and at the same time I preferred to leave him where he was.

• • • • •

Q. After you had gotten him in the sitting position and he said he would be all right, did you then immediately go and telephone?

A. No. I still made sure if to me he was all right. How bad he was injured, I didn't know. So I tried to guess if it will be safe to leave him there. It seems from his answers, the way he said, he indicated that with that protection he had, with his arm around the cables, he could hold for that period of time for me to make that call.

Q. You say you had put his feet resting on one side of this opening?

A. Yes. One of the legs was clear in this area on the platform. Another one, just partly, was above that opening.

• • • • •

[fol. 60] Q. But you didn't leave his feet dangling when you went to telephone?

A. No. At first I placed his feet on the platform and then I went.

Q. Then did you immediately go to telephone?

A. A few minutes or so, maybe, before I made sure he was okay, and then I went.

Q. Immediately after you were satisfied he was all right?

A. That's correct.

Q. You went inside the crow's nest to make the telephone call?

A. Yes.

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Cross examination.

By Mr. Klonsky:

• • • • •

Q. Was it slippery?

A. I don't know if you call it slippery.

Q. Was it worn?

A. What?

Q. Was that plate worn?

A. Worn?

Q. Worn, worn away from use.

A. I can't say it is worn. It is smooth.

• • • • •

Q. The reason you didn't pull him further in to safety is because he was complaining of pain?

A. No. Because he won't let me touch him.

Q. Did he complain of pain?

A. Oh, yes, he did.

Q. Let me ask you this. Were you able to get to the telephone and make your call without going into the crow's nest?

A. I don't think so.

• • • • •

Q. Did you say this: "About 2:30 a.m. on February 16, 1958 I was in the crow's nest relieving Salem who had

gone for coffee. I heard someone climbing up the ladder. I was just about to open the door leading into the crow's nest when I heard Salem loudly call out that the lights or light went out. I don't recall exactly what he said. I opened the door. This door opens inwardly into the crow's [fol. 61] nest. It was completely dark inside the tower. There were no lights lit anywhere inside the tower. I couldn't see anything except blackness."

Mr. Connor: There isn't a single thing that has been read that is contradictory to what this witness has said.

Mr. Klonsky: I am coming to a point, your Honor, and I think this ought to be done in context.

Mr. Connor: I think it ought to be limited as to what counsel says is different.

The Court: Go ahead.

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Q. From what you could observe of Mr. Salem and what he said to you, did you in your judgment think it was safe to leave him there while you went to make the telephone call?

Mr. Klonsky: Objection. That is a conclusion.

The Court: I think so.

Mr. Klonsky: In fact, it is part of the second cause of action.

The Court: Yes. Sustained. It doesn't make a bit of difference what his judgment was.

Mr. Connor: I submit it would. That is the reason I asked the question.

The Court: Objection sustained.

Mr. Connor: I have no further questions.

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The Court: A further reason for that last ruling, when I sustained the objection, is that the standard is not a subjective one.

Mr. Connor: Well—

The Court: Don't argue.

Mr. Connor: I will approach the bench, then, if your Honor wishes.

(Conference at the bench as follows.)

[fol. 62] Mr. Klonsky: There is a claim here the witness was negligent.

The Court: I understand the conduct is not in issue.

Mr. Connor: It has to do with what he could see at the time.

The Court: The standard is not objective.

Mr. Connor: You judge it by the circumstances at the time. I want to show what the circumstances were.

The Court: Nobody has limited you on that. You can have all the evidence you want on circumstances. But don't ask that last question again. That has been ruled out.

(In the presence of the Jury.)

Q. Mr. Richards, what were the circumstances under which you left Mr. Salem to go and make the telephone call for help?

The Court: I think that is repetitious, if you put it that broadly. That ground we have covered, haven't we?

Mr. Connor: I thought your Honor just ruled I might ask a question like that.

The Court: Not a big, broad blunderbuss question that covers the whole waterfront that we have already covered. If you have anything you want to develop, if you have something particularly in mind, go ahead and do it. He has testified, hasn't he, about the circumstances, how he found him, about the light. Are we going to go over that again?

Mr. Connor: No.

The Court: What is it you want?

Mr. Connor: I won't ask any further questions. I will take an exception to your Honor's ruling.

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[fol. 63] PAUL ALLEN GREGWARE, JR., called as a witness by the Defendant, having been first duly sworn testified as follows:

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Cross examination.

By Mr. Klonsky:

Q. Would it refresh your recollection if I told you the chief quartermaster, Barton, came in after the plaintiff had been removed and still saw no lights on?

A. Wait a minute now. Barton wasn't even up around there.

Mr. Connor: I object to that. Mr. Gregware has been excluded by plaintiff's counsel on your Honor's orders from the courtroom. He couldn't have heard what his statement was.

The Court: He is telling him something.

Mr. Connor: He is asking him if testimony refreshes his recollection. How can it refresh his recollection if he never heard it?

The Court: We are talking about the circumstances which are referred to there. Already the witness is alive with interest about this, because Barton is mentioned. Maybe we will get some refreshed recollection. If we do, that is wonderful. We have his recollection.

DAVID J. GRAUBARD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Klonsky:

Q. Are you a regularly licensed practitioner in the State of New York?

A. Yes.

Q. If a man has a congenital back such as you have seen with Mr. Salem, without any pains for 37 years of his [fol. 64] lifetime, absent trauma, absent trauma to his back, do you have an opinion as to whether for the additional 37 years he would still be with or without pain?

Mr. Connor: I object to that, because the factual basis is not clear. The doctor did not see the patient, as I understand it, until after this accident. So that he would have to be giving his testimony with respect to matters which he doesn't know anything about. Again, if it is assumed that he has this spondylolisthesis and spondylolysis which is asymptomatic, then it would be proper to ask him the question, provided the doctor is limited to giving his opinion with reasonable medical certainty.

Mr. Klonsky: That is exactly what I thought my question and Mr. Connor's earlier concession of what plaintiff would have said would mean.

The Court: He can answer it.

Q. Do you have that understanding?

A. Yes.

Mr. Connor: May I have an exception?

The Court: Yes.

Mr. Klonsky: You made the correction. We are taking your correction of the question, with all those limitations.

The Court: You both have been talking to us now. I am saying to the doctor this:

On the basis of what you heard from the both of them, have you an opinion?

The Witness: Yes.

The Court: Go ahead.

The Witness: My opinion is that if for 37 years there were no symptoms in spite of the congenital defect of the back, and if there was no intervening trauma, he would have no further disability with respect to that back.

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[fol. 65] Q. What is the significance of these conditions with respect to his ability to work as a seaman?

A. I will speak only of the orthopedic or the back condition.

Q. Please do that.

A. For work as that of a seaman, as an able bodied seaman, I would say he is not capable physically of doing that type of work.

Q. Is he capable of doing any work that requires manual lifting and extended walking or extended standing?

A. I do know that he did work as a kitchen man on board ship. He can do work—he is capable of performing work that does not require any bending, pulling, pushing, or lifting.

Q. In other words, a sedentary job?

Mr. Connor: I object to that.

Mr. Klonsky: I think that is a proper characterization.

Mr. Connor: I think we will call a halt to this. Mr. Klonsky knows better. He tries to get this in this way all the time. He tries this in every case.

Mr. Klonsky: And you always say that in every case. I said sedentary and I think it is a proper characterization.

The Court: We are not going to have any arguments here. We will suspend for a time and put you in a room together somewhere where you can have all the arguments you want.

Mr. Connor: I think I have to rise to protect my client's interest. I have done it nicely before and apparently it does no good.

The Court: The doctor has described the condition. Counsel says sedentary.

Mr. Connor: That is a leading question. The doctor is capable of saying what it is.

The Court: I don't think that is objectionable. The objection is overruled. Go ahead.

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[fol. 66] Cross examination.

By Mr. Connor:

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Q. Did you make an examination of all these hospital charts?

A. I only saw one hospital chart, of the first admission.

Q. Do you know that the Marine Hospital, in connection with that first hospitalization, did not find any rupture of an intervertebral disc?

A. That is correct, sir.

Q. So that in that respect you disagree with the Marine Hospital?

A. No, sir, I do not. There is no disagreement. There they are describing the condition. I made a diagnosis.

Q. They made a diagnosis, too, which did not include herniated disc. Isn't that so?

A. That's correct.

Q. So with respect to the diagnoses, yours and the Marine Hospital differs?

Mr. Klonsky: I object, unless Mr. Connor specifically refers to which record. I did read one from the Marine Hospital that had herniated disc.

Mr. Connor: That is highly improper. We are talking about the hospital record. The doctor said he read only one record. This speech here is highly improper.

The Court: You go ahead and ask your question, Mr. Connor.

Q. You understand we are talking about that one record, don't you?

A. Yes.

Q. It wouldn't be fair to ask you about a record you haven't looked at.

The Court: Let's not make a speech. If you are objecting to speeches, let's not have you make any speeches.

Mr. Connor: I'm sorry, but I think that is a proper question.

The Court: You are talking about that record. Go ahead.

[fol. 67] Q. You did not take any X-rays of the plaintiff, did you, doctor?

A. I did not take X-rays myself. I referred him for X-rays.

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Q. You did see Dr. Kaplan's report, did you not, of his X-ray examination?

A. Not only did I see his report, but I also reviewed the X-rays myself.

Q. Dr. Kaplan did not find any herniated disc, did he?

A. He merely made a notation of his findings of the X-ray. There is no notation made concerning disc pathology.

Mr. Connor: They are here now.

Q. Dr. Kaplan's diagnosis, as you know, did not include a diagnosis of a disc pathology?

A. That is correct.

Q. In your report of examination dated June 11th, you stated, did you not, that superficial neurologic examination fails to reveal any evidence of intracranial nerve damage?

A. That's correct.

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Q. So that when there is pressure on the nerve you do find in most of these disc cases a difference in the quality of the knee and ankle jerks?

A. In most of those you will find it, but occasionally you will not.

Q. In your examination of them on June 11, 1958, you did not find any differences in the knee and ankle jerks, did you?

A. No sir.

Q. And you tested for it?

A. That's correct.

Q. When you made your first examination, you did not make any conclusion that there was a herniated disc involved, did you?

A. On June 11th, no, sir; but I did make a conclusion on August 21, 1958, after I had received the X-rays and had reviewed them.

Q. That determination you say you made on the basis of looking at Dr. Kaplan's X-rays?

A. Plus the entire examination that I had of the man at that particular time.

[fol. 68] Q. Did you examine him also on August 21st?

A. No, sir, I did not.

Q. So that you were doubtful about it, we'll say, on June 11th?

A. I didn't say that I was doubtful.

Q. I recognize that you didn't say that, but you didn't make any such diagnosis then?

A. I did make a diagnosis suggestive of a herniated disc.

Q. That's right. You said that what you found was suggestive.

A. That's correct.

Q. You didn't make a final diagnosis of it?

A. No.

Q. Then the next thing that you had in relation to this patient was a view of Dr. Kaplan's X-rays.

A. That's correct, sir.

Q. Dr. Kaplan sent you a copy of his report, too, didn't he?

A. That's correct.

Q. Dr. Kaplan did not make a diagnosis of an intervertebral disc pathology, did he?

A. No, sir.

Mr. Klonsky: When you talk about Dr. Kaplan, that's Edward Kaplan?

Mr. Connor: Yes, the Roentgenologist.

Q. You understood I meant that doctor?

A. That's correct.

Q. You also said that you found a difference in the size of the thigh, the right thigh, 15½ inches, as compared to 16 on the left.

A. Yes, sir.

Q. Is that necessarily an abnormal condition due to the pathology?

A. By itself, no, sir.

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Q. If a man is able to sit in an erect position with his legs extended, he should be able to bend over standing up to a 90-degree angle, shouldn't he?

A. Yes, sir.

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Q. Doctor, where you have a patient who is complaining of a history to the back and where you have a history of a fall, with no possibility of taking X-rays, is it normal [fol. 69] procedure to try to relieve pain by putting traction on the legs?

A. Yes, sir.

Q. And putting traction on doesn't necessarily mean that you are diagnosing an injury to any of the bones of the spine, does it?

Mr. Klonsky: I object to a characterization of what some other doctor might have as a diagnosis, as to why he put on traction or what it means to him.

The Court: Yes.

Mr. Connor: This is general treatment of a patient.

Mr. Klonsky: But not by this witness.

Mr. Connor: I am asking what the situation is. He is offered as an expert.

The Court: I think the question is objectionable.

Q. While we are talking about experts, doctor, is your field orthopedies or traumatic surgery?

A. Traumatic surgery.

Q. There is a specialty recognized in medicine is there not, known as orthopedies?

A. Yes, sir.

Q. There are doctors who specialize only in that specialty?

The Court: I don't believe we have to have an expert tell us that.

Mr. Connor: It is not true all over, your Honor. It is true in this city.

The Court: That hasn't anything to do with this lawsuit.

Mr. Connor: I beg your pardon?

The Court: That hasn't anything to do with this lawsuit. Let's get on with the examination.

Mr. Connor: I must respectfully object to that, if your Honor please.

The Court: All right.

[fol. 70] Mr. Connor: I believe I have a right to make that showing.

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Q. I think you said, doctor, that in your opinion Mr. Salem ought not to do the kind of work which would involve, among other things, lifting.

A. Yes, sir.

Q. Do you mean heavy weights?

A. I think lifting things over 20 pounds.

Q. What about work that requires him to bend? What sort of bending do you have in mind?

A. Where you would have to bend over and pick up some heavy object, even a 20 pound object or a 15 pound object, periodically. The occasional bending would be perfectly all right for him to do, providing he isn't in a state or a phase of his condition where he has muscle spasm at that particular time.

Q. In other words, you wouldn't exclude him from work that just required him to, say, bend over and just pick up papers?

A. Occasionally, once a day, twice a day, no, I wouldn't exclude him from that.

Q. But if it were more extensive than that, you would recommend against it?

A. That's correct.

Q. Would that also be true of side bending?

A. Yes, sir.

Q. You wouldn't recommend him picking up anything more than 20 pounds?

A. That's correct.

Q. In making your conclusion that a person who has a congenital condition of the back which was asymptomatic and would remain so for the rest of his life, do you have in mind that changes take place in the spine as one gets older?

A. Yes, sir. I am speaking only of spondylolisthesis. I am not speaking of any other condition, such as arthritis, which may develop in the course of time. But as far as the spondylolisthesis, no, sir.

Q. If arthritis developed in the spine in that area, pain could very well come about, couldn't it?

A. That's correct, sir.

[fol. 71] Q. Your conclusion in respect of that is whether it depends entirely upon the history that the back was asymptomatic over these years and that there is pain now; is that so?

A. Is this in reference to the question you asked before?

Q. Yes. If it isn't clear, I will repeat it.

A. Would you mind repeating it in a different way?

Q. I am saying that your conclusion that Mr. Salem's back would have remained asymptomatic over the years depends on whether or not in fact Mr. Salem ever had pains in his back before and whether he has pain now.

A. Yes, sir.

Q. In giving the answer to the hypothetical question, you did not include in your consideration the Volumes 2, 3 and 4 of the United States Marine Hospital records.

Mr. Klonsky: I object to that as an observation which is not true. My hypothetical question included excerpts from all four volumes, and I should be asked whether or not I did.

The Court: I understood that he was giving the entire history.

Mr. Connor: No.

Mr. Klonsky: I went through all four volumes in going through my hypothetical question.

Mr. Connor: He read certain excerpts.

Mr. Klonsky: From all four volumes.

Mr. Connor: I am talking about the entire record.

The Court: You are saying three of those volumes were not included in the question. Counsel says that he did take material from those volumes. We have the answer for you, and this witness doesn't know anything about that.

Mr. Connor: I respectfully submit to your Honor that I have a right to question the doctor with respect to what basis he used for his medical opinion.

The Court: Mr. Connor, he used the facts stated by Mr. Klonsky in his hypothetical question. Those facts in [fol. 72] eluded excerpts from all of the Marine Hospital volumes. I don't see any point at all in asking the witness, "You didn't include, did you, in your answer to the question three of the volumes of the Marine Hospital records?" when as a matter of fact Mr. Klonsky is the only man who knows about that.

Mr. Klonsky: I did take excerpts from all four.

Mr. Connor: I am not disputing the fact that he took excerpts. I am talking about the complete record—the reports of the X-rays, the report of Dr. Friedman.

The Court: I will sustain the objection. That will put a conclusion to the discussion.

Mr. Connor: I didn't hear the last of what your Honor said.

The Court: I said that will put a conclusion to this discussion.

By Mr. Connor:

Q. Doctor, as I understand it, between July 11, 1958 and October 20, 1960, a period of some two years, you found no essential difference between the findings you made on the June 11, 1958 examination and the one you made in October, 1960.

A. That is correct.

Q. I will read an entry from April 7, 1960, the prior entry: "Forty-year old AS," which I believe means "able seaman."

Mr. Klonsky: American seaman.

Q. "With long history of low back complaints, 2/24/60, made fit for duty by Dr. Wein (phonetic), returned to work two weeks ago; while lifting noticed sharp pain in low back with electric pain down right leg similar to previous episodes. Today is asymptomatic re back and leg. [fol. 73] Exam, back, gait normal; spasm none; point tenderness, none; flex, 90 degrees; rotation good; extension, good; sensory, no defect noted; motor, good; patient has subjective complaints"—I don't know what that is stricken out—"on listing back and these disappear with contraction."

That is a test for malingering, isn't it, when you distract a patient and then try to get him to perform something about which he complains of pain?

A. Yes, sir.

Q. "Chronic LS strain; high functional component; discharged fit for duty." It is signed by a doctor whose name I cannot read.

Mr. Klonsky: Are you going to finish?

Mr. Connor: I have a little more. I will finish before noon.

Mr. Klonsky: I have some re-direct. I won't even ask him to read the X-rays. I wonder if we could conclude and take our lunch hour recess after.

The Court: That's all right.

Q. That examination revealed a normal back, did it not, the one I just read to you?

A. The conclusions were that it was a normal back, but there was a history that was involved in that report.

Q. Leave the history out. I am trying to find out what these things mean.

A. At that particular day—

Q. His back was perfectly normal?

A. That's correct.

Redirect examination.

By Mr. Klonsky:

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In your study of this hospital record, the Marine Hospital, is there any notation that an abstract or copy of the hospital record on the ship was sent with this man for [fol. 74] the doctors in the Marine Hospital to analyze with respect to further treatment?

Mr. Connor: I object to that.

Mr. Klonsky: Will you concede that no such abstract or any such abstract was sent?

Mr. Connor: No.

Mr. Klonsky: The record speaks for itself.

Mr. Connor: I object.

The Court: The record speaks for itself. We don't need to ask the doctor.

Mr. Klonsky: I will ask him about the proper and usual course of conduct—

Mr. Connor: There is no claim here in this case—

Mr. Klonsky: May I finish?

The proper and usual course of conduct, when one doctor or hospital sends a patient to another hospital or another doctor relating to the transmission of records. That

can explain in part, as I respectfully point out, some of the—

Mr. Connor: I object to these speeches. If he has a question to ask, I would like to have him ask it.

The Court: Mr. Connor, I don't know how we are going to get along with this lawsuit at all unless this man can say something. I don't regard that as a speech. He is asking about the usual and ordinary course of practice between doctors when they refer a patient. He is trying to ask that question.

Mr. Connor: With respect to that question, I say there is no claim made here in respect to that, no claim of negligence in respect to that, and I say it is improper, it is irrelevant, and it is immaterial.

Mr. Klonsky: He didn't let me finish.

The Court: He is not getting at what you are talking about. Let's have the question.

[fol. 75] Q. Doctor, is there a usual and regular and accepted course of conduct where a patient is transferred from one hospital or one doctor to another hospital or another doctor with respect to the accompaniment of records?

A. Yes, sir.

Q. What is that practice?

Mr. Connor: Objection.

The Court: Overruled.

A. It is usual to transmit an abstract or a copy or a summary of the history, the physical findings, and the treatment.

Q. Is the history and the treatment and the physical findings directly after an accident significant with respect to the subsequent treatment and subsequent diagnoses?

A. Yes, sir.

Q. Doctor, did you look at volume 1, the very first hospitalization of the Marine Hospital?

A. Yes, sir.

Q. Was there any such abstract, any such record, transmitted by the ship's hospital to the Marine Hospital doctors to allow them to properly evaluate and diagnose and treat this man from the beginning?

Mr. Connor: I object to that. There is no evidence the doctor can give one way or the other on that subject.

The Court: Did you examine that volume, doctor?

The Witness: Yes.

The Court: All the way through?

The Witness: Yes.

The Court: You looked throughout the entire volume?

The Witness: Yes.

The Court: Objection overruled.

The Witness: There is no notice of any transmission of any information.

Q. From the ship?

A. That is correct.

* * * * *

[fol. 76] LAWRENCE I. KAPLAN was called as a witness for the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Klonsky:

Q. Are you a regularly licensed medical practitioner in the State of New York?

A. Yes, sir, I am.

* * * * *

Q. Is it accepted in the medical profession that one may be as severely injured psychiatrically, if not more so, than say orthopedically or neurologically?

Mr. Connor: Objection. It is a leading and suggestive question.

The Court: Overruled.

* * * * *

Q. Doctor, are you able to give us fully an opinion with respect to this man's personality traits and the effect of trauma upon him without knowing something about his family life?

A. Without knowing something about it?

Q. My question to you is, in order to properly evaluate and tell us about this man's present mental condition and how the trauma, if any, was involved, you would find it important for you to know something about his personal family life.

A. Oh, yes.

Q. But you don't give that name to anybody unless it is pretty extreme, do you?

A. I don't.

* Mr. Connor: I must object again to leading questions.

The Court: I think the doctor is giving us some information he didn't get from counsel here, quite a lot of it.

[fol. 77] Mr. Connor: I think it would be much better if the doctor gave the medical evidence and didn't have any of it suggested to him.

The Court: I don't see anything too objectionable yet. We will try to stay away from it.

* You were connected with Stapleton. Before a seaman is admitted, is it true he must have a master's certificate certifying he is in need of treatment?

A. I am only a consultant. I really don't know.

Mr. Klonsky: Can we agree?

Mr. Connor: I would say normally a master certificate is issued, but a patient is not denied treatment if he needs it. All he has to do is establish sea service.

Mr. Klonsky: Plaintiff's Exhibit 5, over the signature of Dr. Fenger, surgeon of the S.S. *United States*: "Was Master's certificate issued? Yes."

Q. That is all that accompanied him; no abstract from this medical log; no report by Dr. Fenger.

Mr. Connor: Objection.

Mr. Klonsky: This I believe is seen in the record.

The Court: Objection overruled.

Q. Doctor, do you have an opinion as to whether this man can go back and do the work of a seaman?

A. I don't believe he can.

Q. Ever?

A. I doubt it very strongly, unless he improves tremendously.

Q. Doctor, perhaps one last question. For any follow-up treatment in a hospital such as the Public Health Service Hospital, what significance, if any, is there in the absence [fol. 78] of a hospital record aboard a ship which started immediately after the accident and continued for two days afterwards?

Mr. Connor: I object to that, if your Honor pleases.

The Court: Read it.

(Question read.)

The Court: I really don't understand the question.

Mr. Klonsky: Perhaps I am not clear.

Q. My question is, this man was brought to the Marine Hospital on February 18, 1958. He was treated for two days in the ship's hospital from February 16th to February 18th. That would be three days, two and a part of a third day. I ask you, sir, first, in your opinion, was it essential for a proper diagnosis and treatment of the man in the Marine Hospital to know what went on in the ship's hospital before he came there?

Mr. Connor: I object to that.

The Court: Overruled.

A. I would think it is most important for anyone coming to a conclusion with regard to the type of initial injury that he had sustained to have medical information or any information that describes what happened to the patient.

Q. In normal procedure and custom, doctor, when a patient is transferred from one facility to another, what is

good practice with respect to transferring his previous records?

Mr. Connor: I think that question was asked of the doctor before and he said he couldn't make any statement about it.

The Court: We will find it. Your objection is overruled. [18-79] A. I am not quite certain about the question. I assume what you would like to know is whether or not the records from a previous facility should be available to a new hospital. Well, I should hope so. That is what we usually do. Whether or not it is feasible to do it is another problem.

Q. Is it good practice to do it?

A. I would think so, yes.

Q. Doctor, you have examined all these hospital records.

Mr. Connor: Just a minute. I wish to object to that. I believe the doctor answered before I got a chance to get on my feet. I want to object to that question and any other questions along that same line.

The Court: The last thing he refers to is, he said you have read all these hospital records. Is that the one you object to?

Mr. Connor: No. It was the one before that.

The Court: The objection is overruled.

Q. You have seen all the hospital records at the Public Health Service Hospital; is that right?

A. Yes, I believe so.

Q. Have you noted in any part, in any place, in any of these Public Health Service records, where any of these doctors there were afforded an opportunity to read and examine the ship's medical logs before they made their conclusions?

Mr. Connor: I object to that, too.

The Court: Overruled.

A. I don't recall any reference to it, to reading the ship's log.

Cross examination.

By Mr. Connor:

Q. But since you gave Mr. Salem the Lasegue test, you would be interested, I take it, in what other doctors felt about it?

A. I would be interested, usually.

[fol. 80] Q. Does that test depend upon the doctor himself, whether he accepts what the signs are or not?

A. I would say to the same extent that every medical test depends upon also the observer and not only the patient. One has to observe what is happening to the patient when a test is given.

Q. You know, doctor, a Dr. Irving Balensweig?

A. Yes.

Q. You regard him as a competent observer?

Mr. Klonsky: I don't think one doctor should be asked to give the qualification of another doctor.

The Court: I think that is a little unusual. Sustained.

Q. You know, too, from your history that some of that abnormal behavior anteceded this accident?

A. Some of the abnormal behavior anteceded it?

Q. Yes.

A. That I didn't know. In what way?

The Court: Bearing in mind what we discussed there—

Mr. Connor: I am not going to do anything more than that. I thought the doctor might have noted—

The Court: Let's not go into that now.

The Witness: I am aware of his entire background from what I learned from the patient himself and the medical records. I am aware of the fact he exhibited bizarre behavior in the hospital. I am not aware that he had bizarre behavior like this before this accident.

Q. Without saying what it was, don't you mention it in your reports?

[fol. 81] The Court: I don't think we ought to be going into this, if it is what I think it is. We shouldn't go into it for any purpose at all.

Q. In the records in the hospital, did you notice any other stress aside from this accident?

A. No. The only other stresses—

Q. All I want is a yes or no on that. You say you did not?

A. Not of any significance with regard to his behavior and to his marked change in personality and behavior and emotional state, other than the accident.

Q. I take it, then, there are other stresses which could produce hysteria such as you found here?

A. Of course, yes.

Q. And they need not be due to any accident?

A. That is true, yes.

Q. For example, a sudden death of a dear one in the family might produce a hysterical reaction?

Mr. Klonsky: I must object. There is no proof here of any death or any other stress.

Mr. Connor: This is cross examination.

The Court: I know, but it is wholly hypothetical. It hasn't anything to do with this lawsuit. There isn't any death of anybody in this claim.

Mr. Connor: I am not making any such contention. I am trying to find the basis for the doctor's statement.

The Court: Go ahead.

Mr. Connor: Do I take it your Honor has sustained the objection?

The Court: Yes.

Q. I noticed in the hospital record, doctor, that from time to time Mr. Salem was given something described as placeboes.

A. Yes.

[fol. 82] Q. What are they?

A. Placeboes are inactive medicines, usually sugar or some other inert substance which is put in a capsule or pill form to give the patient the feeling or the idea that he is

taking medicine for specific relief. Its method of action is by suggestion rather than by direct drug action.

Q. In other words, it is like sugar pills which won't relieve a condition a patient is complaining about.

A. Sugar pills—

The Court: I think we have proceeded far enough.

Q. Doctor, I am looking at a copy of your report, on page 4, in which you say: "On examination motor power was much better than on the last examination, with much less of a functional abnormality."

A. Yes.

Q. That is your opinion today?

A. As of the last examination, yes.

Q. So that from your point of view there was improvement over the period of time between your first and your second examination?

A. Improvement in the functional motor difficulty, which is largely the result of his hysterical reaction; that is, improvement in his psychiatric status and its relationship to his physical disability.

Q. Doctor, where there is an atrophy resulting from irritation to the nerve root, say an atrophy in the leg, and that nerve root irritation continues, does the atrophy get worse or better?

A. If there is atrophy which is not common with nerve root irritation but nerve root compression, if there is atrophy, it may get better or it may get worse depending on how long the compression goes on.

Q. Suppose it goes on for two years?

A. If the atrophy is still present, there is compression going on. Where the nerve root is being irritated and where the sensory elements of the nerve root are the most involved and the motor elements are not involved, there would be no atrophy.

[fol. 83] Q. Did you find any atrophy here?

A. I don't measure the legs, as an orthopedic does, but there was no observable atrophy, as far as I was concerned.

Q. That is as of your last examination as of October this year?

A. Yes. There may have been a difference in measurement, which to me is not significant from the neurological viewpoint. It may be more significant to the orthopedist.

Q. Neurologically you mean damage to the nerves?

A. Yes. In other words, if there is damage to the nerves interfering with nerve supply to the muscle, the leg difference is quite obvious and requires no measurement. If it is because of disuse or something like that, it might be very much less and might escape the naked eye, and in which case measurements, though sometimes inaccurate, are more helpful.

Q. How much of an atrophy would you have to have—

The Court: Haven't we gone far enough with that?

Mr. Connor: Your Honor sustains an objection to this question?

The Court: Yes, I do. I think you have pursued that line of examination long enough.

Mr. Connor: I won't ask any further questions.

JAMES VICTOR SALEM resumed as a witness in his own behalf and, having been previously duly sworn, testified further as follows:

Direct examination (continued):

By Mr. Klonsky:

Q. When did you first try to go back to do any kind of work?

A. The S.S. *Santa Paula*.

Q. What kind of work did you try to do there?

A. I take the easiest job on the ship. That was my idea. I sit too long. I told the doctor I want to try.
[fol. 84] Mr. Connor: I object to any conversation between the witness and an unidentified doctor.

Mr. Klonsky: What he said to the doctor I think is proper.

The Court: He hasn't gotten into anything that is objectionable.

Read it back.

(Record read.)

The Court: Overruled.

Q. Are you still going as an out-patient to the hospital?

A. No.

Mr. Connor: In view of the time, does your Honor want me to start?

The Court: Yes. Let's see if we can finish with this man.

Mr. Connor: I don't think I can do it in ten minutes.

The Court: Maybe you can do it in 40 minutes.

Do you feel dizzy?

The Witness: No.

The Court: Are you all right?

The Witness: Yes.

The Court: If you don't feel right, let me know.

Cross examination.

By Mr. Connor:

Mr. Connor: There is this question. I will limit myself to the reading of one question: "Do you have any mental or physical disability. If yes, explain." There are two boxes, one for no and one for yes. Mr. Salem put an "x" in the box "no," signifying he had no mental or physical disability.

[fol. 85] There is a license expiring in May, 1961, which has a similar question: "Do you have any mental or physical disability? If yes, explain." And in the box "no" an "x" was placed.

You stipulate that Mr. Salem testified that he put those x's there?

Mr. Klonsky: Yes.

Q. You operate that car with putting your right foot on the gas pedal: is that right?

A. That's correct.

Q. You use your right foot to apply the brake?

A. That's correct.

Q. You drive that car some distances at some time?

A. It depends on how I feel, but generally I drive it, yes.

Q. You have driven it at least 40 miles on one trip, haven't you?

A. 20 miles each trip, yes, when I see my children.

Q. You also have driven the automobile from Newark into New York here to see your lawyer on four or five occasions?

A. I don't know. Probably I do, once every two months, something like that, yes.

Q. When you travelled from New Jersey to New York, you come through one of the tubes under the river, do you?

A. That's correct.

Q. In addition to driving this 20 miles you speak of, do you also drive around your own neighborhood?

A. That's correct.

* * * * *

What would you say the distance is from the forward edge of the platform where the opening is up to the crow's nest?

Mr. Klonsky: Your Honor, we stipulated on that.

The Court: I thought all the dimensions were stipulated to. We have the specifications here somewhere. There is no use trying to wring that out of this chap. You have a speech difficulty here.

[fol. 86] Mr. Connor: May I respectfully except and say this is cross examination?

The Court: Of course, Mr. Connor, and I have been keeping my mouth pretty closed on the subject. But I do think if you have stipulated to specifications and dimensions and distances, that that is the better way to do it than to be trying to get it out of this witness.

Mr. Connor: I wasn't aware that we had stipulated it. I am aware of the fact that Mr. Klonsky read the answers to interrogatories, and if that is what he means by a stipu-

lation, that is another matter. I was not aware we stipulated.

The Court: Didn't we receive in evidence a blueprint?

Mr. Connor: Yes.

The Court: What is that?

Mr. Connor: That is a little different type drawing.

The Court: But it has dimensions in it.

Mr. Connor: Mr. Klonsky didn't stipulate the dimensions were accurate. If he so stipulates, that is another matter.

Mr. Klonsky: I rise to say if he didn't understand it was a stipulation when I read it as part of my case, I do rise and say that we do so stipulate.

The Court: All right. Now we got that covered.

Q. Mr. Salem, you have testified you have pain in your back when you bend.

A. That's correct.

Q. I think you demonstrated on the last trial that if you wanted to pick something up you would not bend over at right angles, as I am now; isn't that so?

A. That's correct.

Q. What you said you would do was to squat down with one leg in front of the other and pick it up, that way?

A. Not the way you be doing it. If I do it the way you [fol. 87] do it, it hurts. Maybe I can do it, but it hurts me, I don't want to hurt myself. I do it the easy way not to hurt.

Q. You say even with squatting down with one leg in front of the other and bending the knees, you still have pain in your back?

A. A little bit, sure.

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Mr. Klonsky: One question.

Q. When you put the "x" in those boxes on those applications for licenses, what did that mean to you?

A. It means to me because if you can drive the car, it considers only the car. But as far as drive the car, it is for me easy then to travel on the bus. That is what I consider for me to drive the car. That is the "x".

Mr. Connor: I move to strike that out. It speaks for itself.

The Court: You see, you offered that as an admission against interest in this civil action. I think the man is entitled to say what he understood he was doing when he put that "x" in the bottom. I don't think it does speak for itself, because you are talking about an admission against interest. That is the only purpose you offered it for.

Mr. Connor: That's right.

The Court: If he has an explanation for that we ought to hear it. I will overrule it and the motion to strike is denied.

Q. Without excitement, tell us what the purpose of the "x" is in those boxes where you were asked about physical and mental disability.

A. To me, this question is considered just about to drive the car. It is for me about to drive the car. Yes, I can drive it, because I don't drive it too much. I drive the car, yes. That is why I put the "x". That is what I see is considered just to drive the car. Otherwise I don't put no "x."

[fol. 88] Mr. Connor: 'We have another matter that your Honor reserved decision on. It's with respect to the actual size model of the platform.

The Court: I don't believe there is any point in exhibiting that. I think we have the pictures, the photographs, the oral testimony about it. I don't believe any purpose would be served in showing them a mockup wooden model of the thing.

Mr. Connor: As I say, as to the size, it's exactly the same as this area where the accident is alleged to have occurred, and it shows the various parts that are shown in the photographs. The distances may be visually observed by the jury to see what steps, if any, might have been taken in connection with maintaining himself, and what have you.

The Court: What is your position?

Mr. Klonsky: My position is I have seen this model and it is not substantially the same. It is deceptive. It is made of wood. There are items within the model which do not conform to the photographs. I think it is misleading and should not be allowed.

Mr. Connor: I disagree with everything Mr. Klonsky says, except the model is made of wood instead of aluminum.

The Court: Where is it?

Mr. Connor: Downstairs in the basement.

The Court: Suppose in a recess I go take a look at it. I am reading from * * * plaintiff's deposition before trial.

"Question: Did you ever see a light out before that day?

"Answer: What do you mean?

"Question: Were the lights out in the tower any time before this day of your accident?

[fol. 89] "Answer: Yes. It happened before four or five times, and I reported to the bridge myself one time.

"Question: Is there somebody on the ship who was supposed to replace bulbs?

"Answer: An electrician there.

"Question: Did you ever report to the electrician?

"Answer: No. I report to the bridge.

"Question: Did you ever report to the electrician?

"Answer: Not to the electrician, no.

"Question: Did you ever ask the electrician for any extra bulbs?

"Answer: No."

"Question: Did you ever ask anybody else for the extra bulbs?

"Answer: No.

"Question: Is it a simple thing to put a new bulb in; isn't it?

"Answer: It is easy to put in a new bulb.

"Question: Easy?

"Answer: Yes."

I am now going to Page 129, the first question:

"Question: So that you could always get a new bulb if you wanted one?

"Answer: Yes.

"Question: You told him you could take care of yourself, didn't you?

"Answer: He told me, 'Can you hold yourself?' I said, 'I believe so.' But the moment he told me that, he went to the phone. That is when I started getting more dizzy.

"Question: So that the real trouble is you did not begin to feel dizzy until after he went to the telephone?

"Answer: That is right."

Mr. Klonsky: To keep things in context, may I read the next question and answer?

The Court: Yes.

Mr. Connor: I wish your Honor would look at it. I maintain this is an examination of the plaintiff before trial. It is a self-serving declaration.

[fol. 90] Mr. Klonsky: It would be the last question and answer on the bottom, your Honor. It is related to his head complaints.

Mr. Connor: There was already testimony in the case, in any respect, on this subject given in this trial.

The Court: Objection overruled.

Mr. Klonsky: The next question: "Have you ever fallen down in the street?"

"Answer: Yes, even in my home.

"Question: You have?

"Answer: Yes."

"Question: The lights that are in this tower are to help you see up and down, isn't that so?

"Answer: That is correct.

"Question: They are useful in seeing your way up and down?"

Here the Court interceded and said: "Do they help you when you go up and down?"

"The Witness: Of course. You can't see without more light.

"Question: Does the light on the crow's nest platform show all the way down?"

"Answer: All the way down the ladder, yes.

"Question: All the way down to the bottom?"

"Answer: Yes. The ladder is going up. It shines out all the way.

Question: Can you see better with three lights lit than one light?

Answer: Well, you could see with three, naturally. If there was three lights, better.

Question: So it was more helpful to have three lights lit than one?

Answer: That is correct."

Question: As an able seaman you are supposed to go aloft?

Answer: Yes.

Question: Straight up and down ladders?

Answer: Yes.

Question: And as an able bodied seaman you are supposed to be able to climb up ladders 20, 30, 50 feet high, [fol. 91] aren't you, and these ladders were out in the open deck exposed to the weather?

Answer: You mean all the ships?

Question: Yes. The other ships you were on.

Answer: Yes.

Question: And you have climbed straight up and down ladders many times, haven't you?

Answer: Yes.

Question: Have you ever stood lookout on the crow's nest on any other ship besides the *United States*?

Answer: During the wartime.

Question: Were these crow's nests on those ships during the wartime inside the tower or were they out in the open?

Answer: Out in the open.

Question: Sometimes you had to climb those during rainy weather, is that right?

Answer: Yes.

Question: Sometimes you had to climb up during snowy weather?

Answer: Yes.

Question: And they were ladders that were 30, 40 feet high?

Answer: Yes.

"Question: Straight up-and-down ladders?"

"Answer: Yes."

Mr. Connor: "Question: On these other ships that you climbed up as a lookout, sometimes a ship would be rolling and pitching, wouldn't it?"

"Answer: Yes."

"Question: Sometimes it would be raining while the ship was rolling and pitching?"

"Answer: Yes."

"Question: And it was your job and you had to be able to climb up that ladder and get up there safely?"

"Answer: That is right."

"Question: And there were no platforms on these other ships you were on where you got tired or wanted to rest you could step off?"

"Answer: You mean from the bottom to the crow's nest?"

"Question: Yes."

"Answer: It is not exactly what you call a platform, but still you get some kind of pieces to rest."

"Question: What kind of pieces do you get to rest?"

[fol. 92] "Answer: Not too much space—all right, we call it that way."

"Question: No place to rest?"

"Answer: No. All right."

"Question: But you had a place to rest in the radar tower of the *United States* if you wanted to rest?"

"Answer: Yes."

Mr. Klonsky: Please turn to page 50 of the examination before trial which was just read from the transcript, second question from the bottom:

"Question: So that it was necessary for Richards to leave you to go to use the telephone, wasn't it?"

Mr. Connor: I object to this, your Honor. It is another self-serving statement.

The Court: Who is examining here?

Mr. Connor: It is my examination of the plaintiff in a party deposition. It is an adversary examination of the plaintiff before trial.

Mr. Klonsky: I respectfully submit it is in context with what Mr. Connor read from the transcript to the jury just now related to Mr. Richards, as to whether he thought it was safe, etc.

Mr. Connor: I haven't read that.

Mr. Klonsky: You read: "Question: You told him you could take care of yourself, didn't you?"

I think that is right in context, your Honor.

The Court: I think we ought to read the whole thing in context. The objection is overruled. As a matter of fact, there is some before and some after.

Mr. Klonsky: Yes. That is what I plan to read, if I may.

On Page 50, before what you read, Mr. Connor:

"Question: In order to get help did Richards have to go to the telephone?

"Answer: In order to get help, yes, because he got inside phone.

[fol. 93] "Question: So it was necessary for Richards to go leave you in order to use the telephone?

"Answer: I believe if he put me in a safe place, you know.

"Question: Where would you say would be a safe place?

"Answer: I remember I was sitting down on the edge of the platform, but I believe if he pushed me more closer to the platform I would be more safe, because he don't know exactly how I feel, you know."

"Question: You told him you could take care of yourself, didn't you?

"Answer: He told me could you hold yourself and I said I believe so, but the moment he told me that and he went to phone, that is when I started getting more dizzy.

"Question: So that the real trouble is you did not begin to feel badly until after he went to the telephone?

"Answer: That's right."

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GEORGE H. HYSLOP, called as a witness on behalf of the defendant and, being first duly sworn, testified as follows:

Mr. Klonsky: Previously, your Honor, when I wished to question my doctor with respect to the family background of the plaintiff, there was objection made and your Honor sustained it. The witness who has just come in is Dr. Hyslop. Looking at his report, I see he also goes into great detail with respect to the family background. I wish to have counsel and the witness admonished that what holds true for the plaintiff also holds true for the defendant.

Mr. Connor: I did not object to the doctor testifying about family background. As a matter of fact, Dr. Hyslop, in his opinion, will express what effect if any the family background has.

Mr. Klonsky: My recollection is I came up before your Honor with Mr. Connor and I said to Mr. Connor if he {fol. 94} objected to me going into it and his answer was he would not allow any testimony going into family background, as to his children and wife.

Mr. Connor: I did not.

Mr. Klonsky: Your Honor accordingly ruled, and therefore I withheld any questions related to that from my medical experts.

The Court: I thought we had an understanding about that, that we weren't going into some of this matter.

Mr. Connor: I suggested that we leave out the matter dealing with the fourth diagnosis, and he said all right.

Mr. Klonsky: It was all right.

Mr. Connor: The rest of it I haven't.

The Court: I don't see what this poor man's family troubles have to do with this lawsuit.

Mr. Connor: What should we do?

The Court: I am going to keep it out.

Mr. Connor: Exception. I will have to talk to the doctor about it.

Direct examination.

By Mr. Connor:

Q. Are you a physician duly licensed to practice medicine in the State of New York?

A. Yes.

Q. What is your education and experience?

A. Cornell, M.D., in 1919. Prior to entering medical school I had a Master's in psychology and was a teaching Fellow and instructor in the University of Indiana. I had three years of hospital training before starting practice in 1922, and since then I have worked in the field of diseases of the nervous system. I had ten years' teaching at Cornell. I had 24 years' teaching at Columbia Physicians and Surgeons, before retirement on age. I was in charge of service when on duty at the Neurological Institute from 1930 on [fol. 95] until retirement, in 1958. I still have some functions as consultant at the Memorial Hospital in New York.

I have written about 35 articles; I have contributed to text books; I am an associate editor of the official publication of the American Academy of General Practice. I have been president of the New York Neurological Society; secretary and chairman of the section of neurology and psychiatry at the Academy of Medicine, and Diplomate of the American Board of Psychiatry and Neurology. I was an examiner for that board. Those are the main things.

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Q. What do you conclude from that?

A. I felt again the problem was at the psychological level, and that the sooner this claim was disposed of, he would start (sic) wearing what I thought of as an inappropriate and useless back support. I again did not express the definite opinion as to what extent the man's portrayed disability was genuine.

Q. Did you find anything in your examination which indicated they were or were not, in your judgment?

A. His display. Take what I described on the second examination and to a lesser extent on the first. There was a selective display of inability to make normal body movements, or movements of the trunk in the lower extremities,

but when distracted, these movements occurred normally. I had noted in the hospital records that there was comparable poor cooperation on repeated attempts of orthopedists on the hospital staff to examine him. That was exaggeration. I didn't know how much you might call he lived up to his displays on examination. In the hospital, when he was not examined, there was no such inability to move about. It was when the doctors came to him. That meant to me that there was exaggeration. The degree to which he was exaggerating I was not in a position to judge.

Q. The plaintiff has testified that he used a cane for long walks and is not able to bend over or stoop over without [fol. 96] pain in the back. Would you have any opinion, while making such complaints he wasn't in fact able to bend over without pain and do work without pain and walk without a cane, as to what medical significance, if any, there is?

A. It would mean—what you say is so vividly greater in significance than what I could observe during examination that I would have to say he was maintaining a nonexistent disability.

Q. As a result of your examination of the plaintiff and your study of the medical records, would the facts which I posed to you before with respect to Mr. Salem's ability to walk without a limp and to bend and do some work, give you a sufficient basis of a conclusion as to whether or not Mr. Salem does in fact have a true conversion hysteria?

A. To the extent that there is simulation and misrepresentation, there is less and less reason to feel that there is any genuine disability. Hysteria implies a genuine disability of a psychological character and which the patient lives up to; that is, day in and day out his life is consistent with what complaints he alleges. If there is a conflict between what a man alleges and how he lives, it is how he lives that determines whether he is sick and not what he says.

Q. Does that mean, Doctor, that there is in fact a true conversion hysteria or there is not a true conversion hysteria?

A. If a man misrepresents and does not live up to his alleged disability, there is no hysteria; there is no mental disease. You are dealing with fraud. That is assuming there is this discrepancy.

Q. As a result of your examinations of Mr. Salem and your study of the hospital records, do you have any opinion with respect to whether or not Mr. Salem could go back to work as a seaman?

A. From the physical disease standpoint, there is no reason why he couldn't. The question is whether or not there [fol. 97] is any genuine psychological disability, disability on the psychological level.

Q. What is your opinion whether or not there is any disability on the psychological level?

A. On the facts I have had shown to me to the extent I got on the stand, I know there is exaggeration. I don't know how important it is. I don't know whether he is disabled genuinely or not. I am not in a position to say on what I have seen and heard up to the time I got on the stand.

Q. Is the condition such as you concluded he has of a permanent nature or not?

Mr. Klonsky: I object. If he can't give an opinion, how can he state whether it will be permanent or not?

The Court: Objection sustained.

Q. Perhaps you better explain it to me. I didn't so understand your last answer.

The Court: Read the doctor's answer.

(Record read.)

Q. Suppose, Doctor, we assume that Mr. Salem does not live up to his complaints of pain, does not require the use of a cane, does not limp. Can you express any opinion with respect to the permanency of the condition?

Mr. Klonsky: I object to that.

The Court: Sustained.

Mr. Connor: Exception.

I recognize this is subject to connection and the doctor is being called out of turn.

The Court: The doctor has said, as plainly as I think anyone can say it, that he doesn't have an opinion. He can't tell. He says there is some exaggeration, he thinks. But the extent of it he doesn't know. That is about the size of it, isn't it?

[fol. 98] Mr. Connor: I didn't so understand it.

The Court: That is what the doctor said. We had it read back to you. The objection is sustained.

Cross examination.

By Mr. Klonsky:

Q. Doctor, is it not significant for you as a consultant and an analyst to look at medical records—

A. Certainly it is.

Q. — that pertained to treatment immediately after trauma?

A. If I can get them, of course it is.

Q. Do you know of any reason why it was not given to you?

A. I have no idea. You will have to ask Mr. Connor.

Mr. Connor: I plead guilty. I forgot to send it.

Mr. Klonsky: I object to that statement, that he forgot to send them.

The Court: Yes. Let's not have any more of that.

Q. Let's start with the beginning of the sentence: "Explaining such treatment at this date"

A. What treatment? It is the sentence previously I am talking about. You are still out of context.

The Court: Doctor, I want to admonish you at this point not to argue with counsel in this case. Counsel has you here for the purpose of examining you. Counsel for the ship owner examined you on direct. This is cross examination. I suggest to you that we will get along a lot better if you will just endeavor to answer counsel's questions. Don't argue with him.

Q. Are you familiar with the fact that on the physical level, in the orthopedic clinic, Mr. Salem today is not fit for duty because of his back? Are you familiar with that, yes or no?

A. I have told you I have read what the doctors said. [fol. 99] I don't know whether I agree with them or not. I know the man is a psychological problem. I know the whole record is not that of a man physically disabled. There are no physical findings to support such a basis and I don't know whether he is living up to his disability.

The Court: Just answer counsel's question.

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 Redirect examination.

By Mr. Connor:

Q. Do patients get better who have an injury as described by Dr. Fenger?

A. Yes.

Q. In other words, are any of these matters which were just referred to in the last question things that never get better?

A. The facts show whether they do get better from a physical standpoint. The man's total hospital record shows there was no permanent residual physical disability that he sustained.

Mr. Klonsky: Objection. That is a conclusion to be made from the record.

The Court: The jury will disregard it. Yes.

Mr. Connor: I respectfully except.

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 Mr. Klonsky: I have a few questions and answers to read. Is it my understanding, sir, that though these depositions are marked in evidence, those parts that I read, which Mr. Connor believes objectionable, he will object to, just as ordinary questions and answers?

• • • • •
 "Q. Whose responsibility was it to check the outlets to put in new bulbs?"

Mr. Klonsky: Do you object?

Mr. Connor: I objected to the form of the question.

The Court: Read it.

[fol. 100] Mr. Klonsky: "Q. Whose responsibility was it to check the outlets and put in new bulbs?"

The Court: Overruled.

Mr. Connor: Exception.

* * * * *

"Q. What was on the platform itself?

"A. The material on the platform?"

Mr. Connor: I object to that, if your Honor pleases, as a conclusion of the witness. It is not responsive to the question that was put. He was asked what the material was and he did not answer.

Mr. Klonsky: He spoke of the condition of it as best he knew it.

The Court: Overruled.

Mr. Connor: Exception.

Mr. Klonsky: "A. The material on the platform?"

"Q. Yes.

"A. It was slick.

* * * * *

"Q. What was your observation concerning lights in the radar tower for a month before the accident?

"A. Well, periodically they have gone out, which we had been replacing"—

Mr. Connor: May I first ask the Court to look at this? I notice further down I made a motion to strike the witness' answer as not responsive.

The Court: Objection overruled.

Mr. Connor: Exception.

Mr. Klonsky: "Well, periodically they have gone out, which we had been replacing them and they were reported before the incident that we were going out and that we had been replacing them and they said they will see to it. At the time of the accident it appears they hadn't seen [fol. 101] to it due to the fact that they were out.

"Q. Did you ever serve as lookout in the crow's nest of those vessels?

"A. Well, during the war I did.

"Q. Will you tell us where the crow's nest on these cargo vessels that you sailed on was located?"

Mr. Klonsky: I objected then and I object now, your Honor, as to crow's nests on other ships.

The Court: I would think that that objection should be sustained, unless you claim something that I don't see.

Mr. Connor: Exception. I would then continue reading down on Page 52 from line 15 right through to Page 55, line 19.

"Q. While he was talking to you, did he write down what you said on a yellow sheet of paper?

"A. Yes, something like that.

"Q. After he got finished did you read the paper over?

"A. Yes.

"Q. You signed it?

"A. Yes.

"Q. You signed each page?

"A. Yes.

"Q. Did you tell him everything that was in there was true?

"A. Yes.

"Q. Mr. Terry, did you say in this statement, 'When I went on watch at eight p.m. on 2/15 all the lights up to the crow's nest were lit'?

"A. I don't remember saying that.

"Q. I will read it to you again so that we will be sure: 'When I went on watch at eight p.m. on 2/15'—meaning February 15—"all the lights up to the crow's nest were lit.'

"A. I don't remember that part.

[fol. 102] "Q. Did you also say in that statement: 'Since I was on the ship I have never experienced all the lights being out in the radar tower at one time. Occasionally one or two lights would go out and get replaced.'?

"A. I said that."

Down on the same page, 67, line 21:

"Q. Where was it that you used to get the electric light bulbs that you kept in your room?

"A. The electrician would come around while he was replacing bulbs in the passageway and our area, and we would ask him for a few and leave it on the desk and we place our own.

"Q. You never had any problem about getting bulbs on that ship, did you?

"A. No.

"Q. When you asked for bulbs, did you ask for a bulb of a particular wattage?

"A. We usually use 60 and 75 in our room.

"Q. Did you ask for 40's to use in the radar tower?

"A. No, we didn't ask for any special wattage, just what we had in our room.

"Q. If you had a 60-watt bulb you would put that in, and if you had a 75-watt bulb, you would put that in, is that the idea?

"A. Yes.

"Q. Did you sometimes keep bulbs in those little cubbyholes that are at the base of the radar tower where the pennants were kept?

"A. Sometimes we kept some there and sometimes we kept some at each level."

Mr. Conner: I make an objection to the reading.

The Court: Overruled.

Mr. Klonsky: "Did you say this in the statement you gave to Mr. Rapson: 'There are two electric outlets above the crow's nest platform, one about seven or eight feet higher up and the outlet at the very top of the tower. These two outlets above had bulbs in them but were not lit. [fol. 103] These two electrical outlets, which were the fourth and fifth lights up from the base, were not lighted for a long time. When I first joined the vessel, these upper lights were always on. For a long period of time these bulbs were not changed and these two upper lights were always in darkness. On the day of Salem's accident these

lights were out. These lights were out the day before and for a very long time before that.'

"Did you say that?"

"A. Yes.

"Q. Is that true?"

"A. Yes, it's true.

"Q. Did you say"—

Mr. Connor: I make the same objection to this.

The Court: If you have anything in particular, I want you to show it to me. But if it is your general objection, I am going to overrule it.

Objection overruled.

DEFENDANT'S MOTIONS TO DISMISS AND DENIAL THEREOF

Mr. Connor: If it please the Court, the defendant moves to dismiss the second cause of action, which is the one charging negligence on the part of Richards for not remaining with plaintiff, and also for leaving him in an exposed place. I think the testimony in that respect is clear that the plaintiff sat on the platform with his arm around an upright and that he informed Richards that Richards might go and telephone.

The Court: What he said was, "Will you be all right while I go make that telephone call?" in effect.

Mr. Connor: To which he answered in the affirmative.

The Court: He said, "I believe so."

Mr. Connor: Yes. Then he said that after Richards left him, he then for the first time began to get dizzy. I [fol. 104] respectfully submit that Richards was not guilty of any negligence.

I also urge that even if he were, the defendant would not be liable for any negligence, because at that time he was not performing the work for which he was engaged, namely, as an AB seaman. On those two bases, I move to dismiss the second cause of action.

I also move to dismiss the cause of action for negligence on the ground that there is no evidence here that any negligence on the part of the defendant, assuming there was any, was the proximate cause of the plaintiff's unusual accident.

The Court: You are now talking about the cause of action number one?

Mr. Connor: Yes; the negligence.

Mr. Klonsky: The Jones Act negligence.

The Court: Yes.

Mr. Connor: I also move to dismiss the third cause of action, which is for unseaworthiness, on the grounds there is no proof that the vessel was in fact unseaworthy. There is no proof that the wiring was defective. It appears that lights will go out. It is a fast ship. Bulbs can be shaken loose and burned. The momentary cessation of light could not be regarded as unseaworthiness, under the doctrine established by the United States Supreme Court recently. I gave your Honor the name of the case, which I think is Mitchell against the Trawler Racer.

The Court: Justice Stewart.

Mr. Connor: I believe that case says the ship owner does not have to furnish an accident-proof ship that all it has to do is furnish one that is reasonably fit.

The Court: It also says that his duty to provide a seaworthy ship is nonetheless onerous, because this was a temporary thing.

[fol. 105] Mr. Connor: Yes.

The Court: It says that very explicitly.

Mr. Connor: The temporary thing in the Mitchell case was more than we had here. Here we had a light burn out momentarily.

The Court: I think you misspoke yourself.

Mr. Klonsky: You mean less temporary.

The Court: You said much more temporary.

Mr. Connor: What I meant was this. We had a light burning and all of a sudden it went out. In the Mitchell case the fish slime was on the rail of the deck for some time.

The Court: Not long.

Mr. Connor: I think it was 20 minutes.

I also move to dismiss all the causes of action on the ground that the plaintiff's accident was due to his own negligence in failing to report the absence of light to the bridge prior to his accident after he had been in the radar tower two solid hours, and according to his testimony he knew that two of the lights were out. It appears from the testi-

mony that it was his duty to report to the bridge when lights go out.

The Court: The evidence is that that had been reported, not by him, to be sure, but by a fellow seaman.

Mr. Connor: Not that night. There is no evidence of that, none whatever. Even if that be so, there is no evidence of it. He should have reported it himself during the two-hour period of time he was there. On that basis I move to dismiss the three causes of action.

I understand your Honor is going to deal with the maintenance and cure matter yourself.

The Court: That is right.

Mr. Klonsky: Does your Honor wish to hear argument? [fol. 106] The Court: No.

Your motion is denied on all three causes of action.

BENJAMIN BOYD, called as a witness on behalf of the defendant and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Connor:

Q. Then what happened after that?

A. He took the cane from his car and then he began to use the cane as he walked. He walked over to the bus stop on Brill Street, where he took a bus to New York. I took the bus with him. When we got off at the Port Authority, he took the subway. Somehow I lost him on the subway. I decided anyway, even if I found him, wherever he was going—I didn't know where, but I had a few ideas. I went back to Newark to see if I could find him, to see if I could wait for him and pick him up. If he came home early enough, I would take more film. In New York, I believe that he would probably be using his cane, but when he came to Newark—

Mr. Klonsky: I object to this gratuitous remark.

The Court: Ladies and gentlemen of the jury, what this witness believes or what seems to him, or any interpreta-

tions or conclusions, is inadmissible, and those that we have had are stricken from the record and you are admonished wholly to disregard them. All this witness may tell us, under the rules of evidence, is what he saw; the use of his senses. He may not give us any medical testimony.

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[fol. 107] Mr. Connor: If it please the Court, I wish to offer in evidence the model of that area of the crow's nest involved in this case, the one that your Honor inspected with counsel at the noon recess. I represent that it is made to exact size and submit that it would be helpful to the jury to view it so as to better understand the location where the plaintiff's alleged accident occurred.

Mr. Klonsky: We have been through this. Your Honor has observed it. I object to anything like that, because I believe it will distort and not help; it will confuse and not be of assistance.

The Court: I have already indicated how I feel about that. I will sustain the objection.

Mr. Klonsky: I also object to this repeated offer being made after it has previously been ruled upon.

Mr. Connor: I have to offer it for the record.

The Court: You can make your record.

This is not said critically, of course. It would be good if we had an opportunity to go down and see the ship. We would have seen it as it is now, at any rate, and the whole thing. What you are offering is the platform stage of the thing. I think it is important, as I indicated to you before. If we are going to see it, we ought to see the whole thing as it is.

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Mr. Connor: (Reading): "Deposition of Dr. Irvin Balensweig, taken by the defendant, pursuant to notice dated November 21, 1960,

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IRVIN BALENSWEIG, called as a witness, having been first duly sworn by the Notary Public, testified as follows:

Direct examination.

By Mr. Connor:

"Q. What is your name?

"A. Irvin Balensweig.

[fol. 108] "Q. Where do you live?

"A. My address is 667 Madison Avenue, New York.

"Q. Are you a physician duly licensed to practice medicine in the State of New York?

"A. Yes.

"Q. Please state briefly your education and experience and what specialty, if any, you have.

"A. Graduate of Cornell University, 1918, licensed to practice in New York State, 1918. Trained in orthopedic surgery at the Hospital for the Ruptured and Crippled, St. Charles Hospital for Crippled Children and general surgery at the New York Hospital. I presently hold a rank of attending surgeon to the New York Hospital, The Hospital for Special Surgery, consulting surgeon to Meadowbrook Hospital, South Nassau Community Hospital, Northern Westchester Community Hospital and Beth Israel Hospital of New York City; assistant clinical professor of orthopedic surgery at Cornell University.

"Q. Have you, for the past number of years, doctor, limited your practice to one field of medicine?

"A. Yes, sir.

"Q. What field is that and how long?

"A. Orthopedic surgery for approximately 40 years.

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"A. X-rays were taken by this examiner on January 26th, 1959. The cervical spine is normal. The lumbo-sacral spine and pelvis reveal a poorly developed fifth lumbar vertebra with congenital narrowing of its posterior vertical diameter without evidence of dislocation. In the oblique views the articulations are poorly outlined but these are not considered defects of the pars interarticularis. These,

however, are poorly developed articulations and are congenital.

"Q. What does that word "congenital" mean?

"A. This is something that this man was born with. The sacroiliac and hip joints are normal. There is no evidence of fracture or dislocation. There is no loss of the lumbosacral angle. There is some flattening of the lumbar curve because he holds himself tense.

[fol. 109] "Q. Please continue.

"A. Films of the dorsal spine reveal no evidence of trauma. Now that is the examination.

"Q. No evidence of trauma means no evidence of what?

"A. No evidence of fracture or dislocation.

"Q. The word "trauma"?

"A. Injury. The word means injury.

"Q. As a result of your examination, did you reach any conclusion?

"A. Yes.

"Q. What is your conclusion?

"A. This patient has a congenital malformation of the last lumbar segment. There is no actual slipping of lumbar 5 on sacral 1. I do not personally classify this as either a spondylolysis or spondylolisthesis. There is an exaggeration of the lumbosacral angle giving the impression of some slipping of lumbar 5 on his 1.

"Mr. Klonsky: That is the sacral?

"The Witness: Yes.

"A. (continuing) In any event this congenital malformation is not the result of trauma. Furthermore, during my examination the patient had no complaints with reference to the lower extremities.

"I found an extremely large element of restriction of trunk motion. Restriction of the straight leg raising as outlined.

"It is my opinion that this patient does not exhibit a traumatic lesion of the lumbosacral area and is not in need of orthopedic care for this condition.

"Q. You mentioned, doctor, that there is restriction of the straight leg raising and restriction of trunk motion.

What sort of restriction did you find or what was the restriction?

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"Q. In your opinion, orthopedically, doctor, as a result of your examination and findings which you have just given [fol. 110] us, could Mr. Salem, at the time of your examination in January, 1959, perform the work of a seaman on a steamship?

"A. Well, he could resume his duty, if the brace was removed and if he were promptly rehabilitated for his work. There is no contradiction to his working at sea with the congenital malformation. This is not the cause of his complaints.

"Q. In your opinion, did Mr. Salem require or was he required rather, to wear a Knight spinal brace?

"A. In my opinion, he was not required to wear the brace.

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"Q. In connection with your first examination, did you find any physical basis for the complaints of pain that Mr. Salem made to you?

"A. I would state that on the basis of my orthopedic problem and the orthopedic examination, I would state there was no physical basis, from a traumatic angle for his acting the way he did.

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"Q. Doctor, what opinion, if any, did you reach in relation to the second examination?

"A. I felt that there was a good deal of exaggeration. I stated that a man standing up straight and bends forward through a range of only 30 degrees and then lies down in a supine position and sits up with his trunk practically at a right angle, keeping his knees fully extended is not acting in accordance with fact.

"Q. Would you just explain that, doctor.

"A. Well, I explained that before when I said that while he was lying on his back he would only raise either leg off the table about eight inches and I would then get him to sit up with his legs out straight until his finger tips reached,

I think I said within nine inches of the toe. Yet when he was standing, which is much easier, he reached down until the finger tips were 14 inches from the floor exhibiting only a range of about 30 degrees of motion.

[fol. 111] "Q. What, if any relationship, doctor, does his ability to sit straight up with his legs extended, have, doctor, in your opinion, as to his not acting in accordance with facts?

"A. Well, if he stands up straight and only bends down through a range of three degrees and he lies down and he sits up with a range of 80 degrees, it is not consistent with an organic problem. It is not consistent with trauma.

"Q. In other words, while standing up he ought to be able to bend his back just as far over as to when he sits up?

"A. At least just as far over if not more so. It is much more difficult to do this lying down than it is standing up.

"Q. On this occasion, doctor, did you reach any conclusion, as a result of your examination, as to whether or not Mr. Salem could perform the duties of a seaman on a merchant vessel?

"A. I didn't render an opinion because I stated that there has been no change in his orthopedic status except that he is more resistant to tests.

"Q. What conclusion are we to draw from that, doctor, that he was or was not able on the second examination to perform the work of a seaman in your opinion?

"A. Well, he was again protecting his back with a brace; the I would again make the same statement, that he should be encouraged to dispose of the brace and become activated and then attempt resumption of work. You are not going to hire him while he has got a brace on.

"Q. On this second occasion, did you feel that he had any orthopedic problem which required him to wear a brace?

"A. I did not.

• • • • •
 "Now on the date of December 15th, 1958, pages 89 and 90 of the same records, there is a doctor who states: 'No pain, cervical spine area, no sciatic pain,' then the doc-

tor goes on to give the following under caption 'Impression':

[fol. 112] "Old injury, schizophrenis." Then states, 'Fit for duty one week. Appointment to neuropsychiatry re: fit for duty status and told to return in a week.'

"Now those records are not consistent with an organic problem. It should be admitted that they did find congenital malformation at the lumbosacral area."

"Q. In either of your examinations, did you find any evidence of a disc problem?"

"A. I did not."

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Cross examination.

By Mr. Klonsky:

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"Q. It is your opinion that this man can go back to work as a seaman if he takes off the braces that were given to him by the Public Health Service Hospital physicians?"

"A. And if he would lend himself to organizing his back and mobilizing his back, it would be my opinion that he could resume sea duty and that the congenital malformation which he has had all his life would not hinder him from performing those duties."

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"Redirect examination.

"By Mr. Connors:

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"Q. Doctor, have you had a chance now to look at the 3rd volume of the hospital records which has now been marked Balensweig Exhibit 2 for identification?"

"A. Yes, sir."

"Q. I call your attention to an entry under the date of February 24th, 1960, will you please read that into the record, doctor?"

"A. 'Seen in consultation by Dr. Holman. Back examina-

tion negative. Orthopedically speaking, fit for duty re: back. Should gradually discard brace and cane. Discharged.

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[fol. 113]

COLLOQUY

Mr. Connor: I would like to read just part of the summary of the first admission in the United States Marine Hospital, Page 2:

"This is a 37-year-old Egyptian-born American seaman who was said to be in good health until February 14, 1958. At this time he was climbing up to the crow's nest inside the hollow mast aboard the SS *United States*. As he was stepping across the inside of the column the lights went out and he lost his balance and fell backwards on to the platform, striking his head on the ladder. He was not knocked out at this time, and stood up and thought there was nothing especially wrong; however, he was somewhat dizzy. In the process of climbing back down the ladder"—

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In the process of climbing back down the ladder to ascertain whether there was any difficulty, he lost his hold and fell to another platform, probably about fifteen feet below. He landed on his feet at this time. He was seen by the ship's doctor right away and put on leg traction. The rest of the passage was in rough weather, however, so that there was a good deal of pain. The patient reports that at the time of his injury he could see but could not hear anything."

I want to read from Page 4, condition on discharge: "It is felt that there is no serious physical injury which can be attributed to this patient's fall on February 14, 1958. This patient's main problem seems to be of a psychogenic origin. The prognosis for improvement in these must be guarded."

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Mr. Connor: I will read it: "Transfer note. Thirty-seven-year-old white male." This is in the handwriting of the doctor and it is not too easy to read. "Was ad-

mitted for low back pain and headache following injury aboard ship. Has had numerous hysterical seizures while [fol. 114] in the ward and very depressed. Repeated attempts at back examination have been unsatisfactory because of either malingering or too much emotional overlay. Believe he has received maximum hospital benefits from an orthopedic standpoint and might be helped on NP service. Thank you." It is signed D. Drummond.

Juror No. 2: What is "NP"?

Mr. Connor: Neuropsychiatric service.

Mr. Connor: Here is one, page 28, July 14, 1958. It's a report by Dr. Somberg: Consultation July 14, 1958; patient was examined on July 14, 1958. The patient's history and background were carefully reviewed. His complaints primarily referred to the low back area and dizziness. Neurological examination is entirely within normal limits. This patient has evidence of acute anxiety problems. I find no evidence of organic neurological disease. I would suggest he be referred to the psychiatric department. Signed Harold M. Somberg, consultant neurosurgery.

With reference to the further management of this case, it is obvious that we have a non-organic functional overlay on the pathological spine. To have this individual suddenly discard the use of a Taylor Knight brace would be a difficult maneuver. I would suggest that the patient be supplied with a cane-type lumbosacral corset and also encourage the rehabilitation program. It would appear from the over-all examination and the medical record that he expresses no anxiety to return to work. Signed Arthur A. Michelli, consultant, orthopedic surgeon.

Mr. Connor: I have just two more. The date of this one is November 6, 1958: The patient was able to go out on two successive passes, complaining each time on his return that he had trouble with his back and he was not able to sit in one place for any length of time. Patient was [fol. 115] seen on several occasions by the orthopedic service, where it was felt that his difficulties were primarily of functional origin; no therapy was advised. The patient was currently—

Mr. Klonsky: Wait.

I object to that.

I thought you said you weren't going to read that.

Mr. Connor: No.

Mr. Klonsky: Show it to his Honor.

Mr. Connor: This is part of the exhibit.

The Court: Let me see what you have there. Maybe we got something in here inadvertently.

(Discussion at the bar off the record.)

The Court: A lot of this stuff is all hearsay in this, what this fellow is stating. He doesn't know what is going on over here.

Mr. Connor: Evidently he got this from the patient. May I have the reporter write what you excluded in the record?

The Court: Yes.

(The following was copied from the document:

"The patient is currently involved in a lawsuit against a shipping company for a back injury.")

Mr. Connor: I respectfully except to your Honor's ruling.

The Court: That is all right. Sometimes when we get this case over I will tell the jury what that means.

Mr. Connor: I didn't hear you, Judge.

The Court: I said sometimes when the case is over I will tell the jury what this is about. It hasn't any bearing now.

Mr. Connor: I thought I made my position clear on that.

The Court: It had its origin in 1285 in the statute of Westminster II. We have long since gotten rid of it. It isn't necessary to do that any more, as Mr. Connor told [fol. 116] us here the other day. But men who have been in the practice of the law during the time when it was necessary to take an exception carry that practice over. It's over a great abundance of caution, because if you didn't happen to except to some ruling of the court in the record, you couldn't get it reviewed upstairs.

Mr. Connor: Because my conversation took place at the bench, that is why I noted the exception.

The Court: That is all right.

Mr. Connor: That is material your Honor said would be left out.

The Court: Yes.

Mr. Connor: Did I put that on the record?

The Court: Let the reporter copy it in.

(Following portion copied into the record as directed:

"Patients inform me this man is having severe marital difficulties and apparently is involved in a legal battle re custody of his children.")

Mr. Connor: Does your Honor want any criticism?

The Court: Any time. Maybe the time to do it is while you are thinking of it.

Mr. Connor: What I wanted to say to your Honor is that I should take exception to any issue being submitted to the jury in respect of handrails or hand grabs or lifelines in that radar tower, because there has been no evidence whatever that such handrails or lifelines are proper for such an area. It is a small enclosed area where the widest part is four feet, the narrowest is three feet. There is no expert that has been called here to testify that under such circumstances in such a ship there should be any such thing as handrails or lifelines.

[fol. 117] Mr. Connor: I was wondering whether or not you would also charge from the language of Judge Stewart in the Mitchell case this: "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness."

Mr. Klonsky: He said that.

Mr. Connor: He omitted the first part of the sentence, "accident-free ship."

The Court: I have another phrase that I use here and which I propose to use. I say that the defendant is not

responsible for non-negligent, unintentional accidents, not arising from the breach of warranty of seaworthiness. Non-negligent, non-intentional accident he is not responsible for. I like that better than to say an accident-free ship.

Mr. Connor: That is what the Supreme Court said.

The Court: But the Supreme Court wasn't charging the jury.

Mr. Connor: But they were establishing the law, which I think is binding on all of us.

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The Court: There is one thing that is very disconcerting in a trial of a lawsuit. It is disconcerting to me and it must be disconcerting to you and it used to be disconcerting to me as a lawyer. It is that your time is limited, 45 minutes to a side. I don't ordinarily permit interruptions. As a matter of fact, you can talk about the Sputniks, if you want to, in your argument to the jury. I don't sustain objections. What I am likely to say here, unless there is something just awfully bad and unreasonable, I am likely to say to you to—I don't ordinarily interrupt counsel while he is making his summation. If you have any objections, you make them after he is through. I thought I would [fol. 118] mention that to you in advance. Of course, I don't need to warn you people about that. You have been practicing here for a long time and know more about it than I do. I don't expect either one of you won't take advantage of the situation.

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Mr. Connor: Signature, J. R. Fenger, surgeon. Then at the bottom, signature of applicant, James Salem. Then attached to that paper is a letter on the stationery of United States Line, with its address, dated February 18, 1958: "To whom it may concern, Re: Salem, James; This patient suffered a severe injury to his spine, following a fall from the crow's nest aboard the S.S. *United States* on February 16, 1958, at 0300. He has been treated with tractions on both legs, twelve days, 25 pounds, since his injury. No X-rays were performed aboard the ship due to the lack of portable facilities. Examination has been limited due to

pain and our reluctance to compound the injury before adequate X-ray studies were available. He had initially a short period of cerebral concussion with amnesia which subsided after 12 hours. There is no evidence of injury to the extremities, thorax or abdomen of consequence. Since the injury he has had motor function of the thigh indicating preservation of the femoral and obturator nerves. He has had loss of sensation on pin-prick of the entire lower extremities, but retains a proprioceptive reception. He has major loss of function of the common peroneal nerve but some function of the interior tibial nerve as evidenced by continued function of the extensor calcus longus. Needless to say, complete X-ray and neurological studies are in order. The originally utilized weight tractions over pulleys, Buck's extension, has been substituted with traction by Spanish windlass. At present this is set at 12 pounds for each extremity. Please return the traction apparatus and crib that accompanies the patient. Further details relative to treatment will be readily supplied if needed."

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Summation by Mr. Klonsky:

[fol. 119] You were asked why didn't he ask for lights of the bridge, why didn't he go to the bridge when he saw the two bottom lights were out. The condition of the lights in that radar platform was known for so long a time and complaints had so persistently been made that he would have been chastised if he had used that bridge telephone for emergencies to complain about the light.

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What is unseaworthiness? You have heard that expression from Mr. Connor. It is something reasonably fit for its purpose. Is a light that goes out reasonably fit for its purpose? Here is a case where pennies to get rough service bulbs were not used—and thousands in the defense of litigation. Household bulbs, Mazda or GE lights, five to six hundred, were replaced every day. This ship pitching in a winter sea, way up, this tower, this chimney with a top closed, subject to more buffeting than any other part of the ship, household bulbs, five to six hundred a day. You

mean to tell me that this is giving a man a safe place to work?

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He comes to you without any past history, to show that he is anything but an honorable man. He was an Egyptian and became an American citizen. He accepted our standards of justice and seeks it here. You are being told to throw him back into the street, away from his welfare rolls.

I submit to you that is cruelty.

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You focus it in that light and you look at the main issue in this case, and I respectfully submit that the only decent and just verdict would be a very high one for the plaintiff who suffered so, not only by reason of the fault of the defendant, but the cruelty expressed in the summation by the defendant.

[fol. 120]

CHARGE OF THE COURT

The Court: (Ritter, J.) Ladies and gentlemen of the jury, it now becomes my duty to tell you what the law of this case is. It is your obligation under your oath to pay strict heed to what the Court has to say and to follow that law. I am going directly to the case.

The plaintiff has filed a claim here which we call a complaint in which he has three causes of action: first, the plaintiff claims that the defendant was negligent, and the plaintiff claims that the defendant was negligent in that while the plaintiff was proceeding to his area of work in or about the radar tower on the ship the *United States*, climbing a ladder, reaching a platform, stepping across the platform, stepping across the manhole to a platform, and where he fell and was injured, the defendant was negligent in having that platform in a slippery, worn condition; and he claims that as a result of that slippery and worn condition, which he claims was negligent on the part of the defendant, that he fell, and that he suffered injuries.

The plaintiff claims the defendant was negligent in another particular. He claims that the defendant was negli-

gent in not having proper lighting at the time and at the place and under the circumstances of this accident. He claims two things there. He claims first an omission, a failure to provide any lighting, or proper and adequate lighting, and he claims, next, a commission, that is, the providing of improper or inadequate lighting, or improper and out-of-order electrical wiring and electrical fixtures.

Ladies and gentlemen of the jury, the plaintiff claims another item of negligence, and that is the plaintiff claims the defendant was negligent in failing to provide reasonably safe railings or other safety devices in or about the radar tower in question.

I am going to move to the third cause of action. You will observe in what I have said up to this moment that the [fol. 121] plaintiff's claim in the first cause of action, in all three particulars to which I have referred, is concerned with the negligence of the defendant. Now I am going to move on to this third cause of action, which is not based upon negligence at all.

It isn't necessary for him to show the defendant was negligent. Indeed, as I shall tell you shortly, the due diligence of the defendant does not excuse him from a breach of the obligation which the plaintiff here claims the defendant breached, and that is the obligation to provide a seaworthy ship.

A seaworthy ship, ladies and gentlemen of the jury, is not confined to the hull of the vessel—a sound ship in that sense. It applies also to the ship's appurtenances and the appliances on the ship. The plaintiff claims here in his complaint that he was injured as a result of a breach by the defendant of the obligation to provide a reasonably safe and sound vessel and appurtenances and appliances, and he claims that that failure caused his fall and his injuries, and he claims damages for those injuries.

Before I go on to the defendant's answer, I must talk to you about the second cause of action. I have spoken now about the first, which is based upon negligence in three particulars: the permitting of the platform to be worn and slippery and dangerous; second, the failure to provide railings or safety devices; and third, the failure to provide

adequate lighting or any lighting at the time of the accident; and the commission or active side of that particular aspect of the case, of providing poor, inadequate and improper lighting or out-of-order electrical fixtures and parts.

The third cause of action, not based on negligence at all, but based on the unseaworthiness, is a different doctrine and which I am going to talk to you about pretty soon. I don't want you to be confused about the two theories upon which the plaintiff is proceeding here.

In the first cause of action he must show that the defendant was negligent. I am going to define that for you pretty [fol. 122] soon so that you know what we mean by that. In the third cause of action he doesn't need to show that the defendant was negligent at all. I am going to define unseaworthiness more particularly for you shortly. I am now attempting to open up the case to you by showing you the general outlines.

The defendant in answer to the complaint filed its answer. The defendant in its answer admits some things that are important here, and so far as they are admitted they are laid out of the case. You need not concern yourself with them. The defendant's answer admits that the defendant owned, operated, controlled, managed, equipped and manned the vessel the SS. *United States* at all times that are important in this lawsuit.

The defendant also admits that the plaintiff was in the employ of the defendant as a lookout, an able seaman, at the times important in this lawsuit.

The defendant United States Lines, Incorporated, which is the owner and operator of the ship, denies that the defendant was negligent in any one and all of the particulars on which the plaintiff bases his claim, and the defendant denies that the ship was in any way unseaworthy.

The defendant goes further and alleges the accident was the sole and complete result of the plaintiff's own negligence, and particularly the defendant claims that the plaintiff was negligent in not repairing the lighting situation himself, and secondly, in not reporting the poor lighting situation of the bridge to his employer.

Ladies and gentlemen of the jury, I now want to address myself a little further to the second cause of action, which is also based upon negligence, and that deals with the seaman Richards' alleged negligence. You will recall there is a claim here, which we call the second claim of action in this case, that the seaman Richards, hearing the screams of the plaintiff after he had fallen, came out of the lookout, the crow's-nest, and attempted to assist the plaintiff. He [fol. 123] got him up on the edge of the manhole, sat him there, and assisted him to put his arm around some enclosure. As I understand it, the enclosure is some metal enclosure in which there are wires and conduits. This is all in the dark, because there are no lights. The plaintiff claims that Richards then said, "I want to go to the phone and make a call for help. Do you think you can hang on?" The plaintiff in effect said, "I believe so." And Richards went out to make the call.

I want you to understand clearly the nature of the claim here. What plaintiff claims, as Mr. Klonsky explained to you with respect to Richards, is that if you find that the defendant was negligent in any one or two or three of the three particulars in the first cause of action, and if you find that that negligence was the cause, the competent producing cause, of the plaintiff falling and becoming injured, then you are entitled, ladies and gentlemen of the jury, to take into account any injury or damage that you find was occasioned by the second fall as a consequence fairly and reasonably following from the first, and to allow damages for it, whether or not you find Richards to have been negligent.

Of course, if you find Richards to have been negligent in what he did or failed to do in looking after the plaintiff, then, of course, that negligence likewise is attributed to the shipowner, who is responsible for it; and if you so find, and find that the negligence caused the plaintiff to fall the second time and from that fall he sustained injuries, you should award your verdict to him on that cause of action, too, and award him damages.

Again to repeat before I go on, I am now talking, not about unseaworthiness, I am now talking not about the absolute liability of the shipowner if he fails to maintain

a ship, appliances and appurtenances reasonably fit for the purpose for which they are intended; I am going to now talk to you for a little while about negligence, and that is [fol. 124] the basis for liability with which we are concerned in the first cause of action and the second cause of action. After that I shall talk with you about unseaworthiness, and that we will be concerned with in the third cause of action only.

Now with respect to negligence, ladies and gentlemen of the jury, in this state of the record, which I have outlined to you by telling you what the plaintiff claims and what the defendant denies, and what the defendant claims, I say to you that the plaintiff in this case, Mr. Salem, has the burden to produce evidence before you which you believe and which satisfies your minds by the fair preponderance thereof that his injuries were caused by defendant's negligence. The term "preponderance of the evidence," ladies and gentlemen, means merely the greater weight of the evidence.

This is a civil case as distinguished from a criminal case. You folks have been sitting in the court house here sometimes and you may have tried a criminal case or two. You may have heard the judge charge you in the case at hand, namely, in a criminal case, that it is your duty to examine the evidence and the State has the burden to satisfy your minds beyond a reasonable doubt. The plaintiff doesn't have that kind of burden here. The plaintiff's burden here is to produce evidence before you which satisfies your minds by a preponderance of the evidence, meaning the greater weight of the evidence.

Now I come, ladies and gentlemen, to the problem of attempting to define for you what we mean by negligence. I am speaking again only of the first and second causes of action. The standard of conduct to which the defendant is held in this case is that of a reasonably prudent man. Of course, you know that the defendant is a corporation, and of course a corporation can act only through its officers, employees, agents, servants; and when I talk about reasonably prudent men, I am talking about the people who act for the corporation, because if they fail to attain to the

[fol. 125] standard which the law imposes upon them, they are negligent, and that negligence is imputed to the employer and the employer is responsible for it and may be called to answer in damages for it.

If the defendant, let us say, acts otherwise in the circumstances than a reasonably careful and prudent person would have acted, he is negligent. If what the defendant failed or omitted to do what a reasonably careful and prudent person would have done in similar circumstances, the defendant is negligent. If the defendant did what a reasonably careful and prudent person would not have done, the defendant is negligent. And it is for you folks to apply that standard or measure of conduct to the facts of this case.

The defendant is not liable for non-negligent acts or omissions. The defendant is not an insurer. I am talking now about both, or all three causes of action, for that matter. The defendant is liable on the first and second causes of actions only if you are satisfied by a preponderance of the evidence that the defendant is negligent. The defendant is liable only if what he did or failed to do was negligent or careless within the scope of the legal standard which I pointed out to you. If the acts of officers, employees or agents of the defendant are negligent, that negligence is imputed to the defendant corporation as a matter of law, and the corporation defendant may be held responsible for those acts or omissions.

I am going to put it to you hypothetically with respect to the first cause of action. If you should find, after deliberating in this case, that the defendant acting through such employees or officers or agents was negligent, as I have defined it to you, in permitting the metal platform to be and remain in a worn, slippery and dangerous condition, or two, if you find the defendant was negligent in failing to provide railings or other safety devices, or three, if you find the defendant was negligent or careless in failing to provide any or reasonably adequate lighting, or if you find the defendant was negligent in providing dangerous [fol. 126] or inadequate lighting or electrical wiring or parts in the radar tower, and if you further find that such negligence, if any you find, was a contributing cause to

plaintiff's falling and his injuries, your verdict should be for the plaintiff, and you should assess his damages. I shall tell you about the measure of damages later. I am talking only about the first cause of action now.

On the other hand, ladies and gentlemen of the jury, if you do not find the defendant negligent in one or more of the particulars claimed by the plaintiff, or if you do not find that such negligence, if any you should find, was a contributing cause of plaintiff's injuries, then your verdict should be for the defendant on the first cause of action.

On the second cause of action—and I will put it to you the same way—if you should find that plaintiff's fellow seaman Richards was negligent in placing plaintiff after he had first fallen and was injured, if you so find, in a seated position on the platform at or about the edge thereof and then left him alone and in the dark while the seaman went into the crow's nest, if you so find, and if you further find that such negligence, if any, contributed to cause plaintiff to fall again, causing new injury to his person or aggravating or increasing the severity of the injuries already suffered, if any you find, your verdict should be for the plaintiff and against the defendant and assess plaintiff's damages—again about which I shall speak later. I have been speaking only of the second cause of action.

I have already told you that plaintiff makes two claims with respect to the second cause of action. If you find the negligence and the negligence caused the second fall, if you find there was a fall, and the plaintiff was further injured, or prior injuries were aggravated in any way, you may find for him. But there is another theory with respect to the second cause of action, and that is if you find for the plaintiff on the first cause of action and find the defendant negligent, then you may find on this record, if that be the state [fol. 127] of your mind, that the second fall was a consequence of the first, and assess damages for the plaintiff and against the defendant such damages you may find that consequentially followed as a result of the first fall and by reason of the second fall.

On the other hand, ladies and gentlemen of the jury, if you do not find the defendant negligent on the second

cause of action, or that that negligence, if any you find, was the cause of plaintiff's fall and injuries, or if you do not find that there was additional injury in the fall following from the negligence, if any you find, on the first cause of action, then you should find for the defendant on the second cause of action.

Ladies and gentlemen of the jury, I move on to the third cause of action, which is based upon an entirely different principle of law. Under the maritime law there is an absolute obligation resting upon the owner to provide a seaworthy vessel and appliances, and if he defaults in the performance of that obligation, the owner is liable for any injuries caused by the breach of the obligation.

The law terms this obligation the shipowner's warranty of seaworthiness. By virtue of it, the shipowner is under a duty to furnish and maintain a ship and its appurtenances reasonably fit and suitable for their intended use. The standard is not perfection, but reasonable fitness. What I am saying is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute; but it is the duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness, a vessel reasonably suitable for her intended service.

This obligation of the defendant does not at all depend upon negligence. The shipowner is not freed from liability by the mere showing of due diligence to render her seaworthy. The warranty imposes upon the shipowner, such as the defendant here, the duty to maintain a reasonably sound ship with safe and proper appliances, in good order [fol. 128] and working condition, reasonably fit for their intended purpose.

Underlying this principle, ladies and gentlemen of the jury, is a humanitarian policy which is derived from history and experience in the shipping trade over many years. It is derived from and shaped to meet the hazards of a seaman's occupation under conditions of traditional discipline on ships at sea. The plaintiff here contends that the conditions referred to in his first and second causes of action made the ship or its appurtenances and appliances unsea-

worthy within the scope of the principle to which I have been referring. In particular, the plaintiff claims that he was caused to fall and was injured as a result of the defendant's breach of its obligation to furnish a vessel or appurtenances reasonably fit for their intended use, in that, one, the defendant permitted the metal platform to be and remain in a worn, slippery and dangerous condition and not a safe place to work; in that, two, the defendant failed to provide railings or other safety devices; in that, three, the defendant failed to provide any or reasonably adequate lighting; and that, four, the defendant provided dangerous and inadequate lighting and electrical wiring and parts inside the radar tower, rendering it an unsafe place to work.

If you find, ladies and gentlemen of the jury, and I put it to you if you should find from a preponderance of the evidence, that, one, the metal platform in or about the crow's-nest was not reasonably fit for its intended use by reason of its condition, as we have referred to it, and not a safe place to work, I say if you so find, ladies and gentlemen, and if you further find that such condition was a competent producing cause of plaintiff to fall and to become injured thereby, your verdict should be for the plaintiff and you should assess his damages, as I shall indicate later. I say to you, ladies and gentlemen of the jury, further, if you should find from a preponderance of the evidence that the radar tower in or about the crow's-nest was not reasonably fit for its intended use by reason of the defendant's failure to provide railings or other safety devices and was not a safe place to work, I say to you if you so find, and if you further find that such condition was a competent producing cause of plaintiff to fall and to become injured thereby, your verdict should be for the plaintiff and you should assess his damages. I say further to you, ladies and gentlemen of the jury, if you should find by a preponderance of the evidence that the radar tower in and about the crow's-nest, and the ladder there, too, were not reasonably fit for their intended use by reason of the defendant's failure to provide any or reasonably adequate lighting, or by reason of the defendant providing dangerous

and inadequate lighting, if you so find, and if you further find that such conditions were a competent producing cause of plaintiff to fall and to become injured thereby, your verdict should be for the plaintiff and you should assess his damages.

Should you find against the plaintiff on any one cause of action or several causes of action, you may nonetheless find for him on another. Of course, ladies and gentlemen of the jury, with respect to seaworthiness as well as with respect to negligence, if your findings are against the plaintiff on these various claims, your verdict should be for the defendant upon such claim as you find against the plaintiff.

Ladies and gentlemen, as a seaman, the plaintiff does not assume the risk of an unsafe place to work and cannot be blamed for working in an unsafe place. The negligence of fellow seamen or ship's officers cannot be imputed to the plaintiff, but as a matter of law is imputed to the defendant, who is responsible for the negligent acts of plaintiff's fellow crew members or ship officers, if any you should find. The negligence of any fellow seaman is not a defense, and such negligence is computed (sic) to the shipowner.

The comparative-negligence rule applies to this case in both of its aspects. That is to say, the contributory negligence of the plaintiff, if any you should find, is not a defense either to the claims based upon negligence or the claims based upon unseaworthiness. The contributory negligence of the plaintiff is a defense to this action only if his negligence is sole and complete; that is to say, if his negligence alone produced the accident and his injuries. If both were negligent, if that should be your finding, if the defendant was negligent and his negligence contributed to cause the injury, or if the ship in one of the particulars I mentioned was unseaworthy, or its appliances and appurtenances were unseaworthy, and those conditions caused the fall and the injury, and if you find that the plaintiff, too, may have been negligent in one or more of the particulars claimed by the defendant, and the plaintiff's negligence contributed in some wise to the accident and his injuries,

then you just don't find for the defendant. This isn't the defense. We apply the rule of comparative negligence in these cases, and the way that operates is you find, if you reach this point, what his damages should be, what his recovery for the whole injury, assuming it to be caused by the defendant, should be, and then you reduce that proportionately to whatever extent, by whatever fraction, you think the plaintiff's negligence may have caused or contributed to cause his injury.

Ladies and gentlemen of the jury, even if a light goes out suddenly and creates darkness that the shipowner may not have yet had notice about or time to correct, nonetheless there may be a breach of the warranty of unseaworthiness within the meaning of the principle upon which we are operating. The owner's duty to furnish a seaworthy ship is no less with respect to an unseaworthy commission which may be only temporary. The shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. Liability for a temporary unseaworthy condition is no different than when the condition is permanent.

[fol. 131] Ladies and gentlemen of the jury, I have spoken about contributory negligence on the part of the plaintiff. The plaintiff had a duty, too, to exercise reasonable care and prudence in the performance of his work for his own safety. If you find that plaintiff failed to exercise reasonable care and prudence in looking after his own safety and in failing to correct the dangerous condition, if any you find, if you find he so failed, or in failing to record it to the proper authority for correction, if you so find, and if you further find the plaintiff's negligence, if any you find, contributed to cause his injury, such contributory negligence is not a defense to the action, as I have told you, unless his negligence is the sole and complete cause of the accident. He is entitled to recover a sum of money based upon a deduction of what he is entitled upon his percentage of his own contribution to the accident.

Ladies and gentlemen of the jury, there are some general things about which I want to talk to you before I come to the subject of damages. As regards any dormant or

pre-existing condition which did not disable the plaintiff, if you find he had any, if it was activated or brought to light by reason of trauma—and that means, as you have been told many times, injury—imposed by the defendant, then the defendant must completely respond in damage as if the plaintiff did not have this prior idiosyncrasy.

Now we come to the subject of damages, ladies and gentlemen. Damages are divided into special and general damages. It is my duty to talk to you about all these issues in this case. I have talked about the issues of liability, based first upon negligence, secondly, upon unseaworthiness. If you find for the plaintiff upon any one or more of those claims, it will be your duty to assess the plaintiff's damages. The damages are divided into special and general damages. What we mean by special damage is loss of earnings, loss of earnings that has been sustained in the past, loss of earnings that is being sustained in the present, and future loss of earnings, if any you find. Special damages [fol. 132] include medical obligations, out-of-pocket expenses for his doctors and medicines or hospitalizations, if any you find, and it includes not only those expenses up to date, if any you find, but also future obligations incurred and reasonably expected to be required hereafter.

General damages, ladies and gentlemen of the jury, include pain and suffering, permanency, humiliation, embarrassment, the interference with plaintiff's right to enjoy his life in a normal and reasonably pain-free manner, any loss of bodily function, if you should so find.

In considering his loss of earnings, you should take into account his past earnings, of approximately \$600 a month, as I remember the evidence, but if I misstate the evidence, it is for you ladies and gentlemen to determine that matter upon your own recollection. In any event, you should take in his prior earnings, his monthly earnings, in computing his past loss of earnings and his reasonably-expected future earnings, if any you should find.

In determining any award of damages with respect to his future loss of earnings, you may consider the United States Life Tables, sometimes called the Mortality Tables, sometimes called the Actuarial Tables, published by the

National Office of Vital Statistics. Those tables say that a white male, 37 to 38 years of age, at the time of this accident had an average remaining lifetime of 33.86 years.

Ladies and gentlemen of the jury, you are the sole judges of the evidence in this case, the sole judges of the facts, and the sole judges of the credibility of the witnesses here. By credibility of the witnesses, I mean it is for you to determine whom you will believe and what you will believe. It is for you to determine where the ultimate truth in this case lies, because there is a conflict in the evidence.

Ladies and gentlemen of the jury, when I examined you on your oath at the beginning of this trial, I charged you it would be your obligation to decide this case on the evidence [fol. 133] and on no other matter. Of course, I charged you, too, as I have now, that you must pay attention to what the Court says about the law. I say to you, ladies and gentlemen of the jury, the evidence in this case is the exhibits, and it is also the testimony of the witnesses who have been sworn, examined and cross-examined before you here, and it is your duty to decide the case on that evidence. You are the sole judges of it. I have been charging you. Counsel addressed you in summation. Counsel addressed you at the beginning of the trial. We have all had something to say during the course of the trial. I want to say to you that nothing that counsel has said to you and nothing that the Court has said to you is evidence. You are obliged to follow what the Court has to say about the law.

The Court is entitled to comment upon this evidence, if I want to. I can take each one of these causes of action and tell you what I think about it. At the same time I should be obliged to tell you that no matter what I thought about it, it is for you and for you alone to decide what you think the evidence shows and to reach your own conclusion. I don't think it is necessary in these cases for the Court to comment on the evidence, so I don't do it. But I want to say to you if the Court said anything, or if counsel, either, said anything during the course of this trial, it is your privilege to disregard it, so far as it refers to the evidence of the facts. You may not disregard what the Court has said about the law.

Ladies and gentlemen of the jury, when you retire to deliberate upon your verdict, heed well the instructions. Take as much time as you want. We will send the exhibits in with you. If there is any help we can give you, please feel free to communicate with me and we will try to assist you in any way that we can. Don't be in a hurry about this. You can proceed in your own way. You should examine this evidence carefully, thoroughly, deliberate upon it, without any bias or prejudice of any kind, way, shape, matter [fol. 134] or form. There should be no sympathy, no passion, no prejudice of any sort, because you have been told you are to decide this case on the evidence. The defendant is a corporation here. The plaintiff is a seaman. I want to say to you that an even hand of justice requires that you pay no attention to those facts. Decide this case on the evidence fairly, squarely and as conscientiously as you can.

I am a great believer in the jury system. This is our method of doing things. In continental Europe they don't do it this way, and in a lot of other places. But here a man has his opportunity, and a woman, too, to have his case viewed by men and women picked up at random, chosen by a lot. All interests are attempted to be eliminated by your examination. Do you know what I find? I find these juries do a remarkably good job. We never had any trouble in my experience with a jury. We leave it in your hands. You are called upon to do one of the highest obligations men or women ever are called upon to do, and that is justice between this man Salem and the United States Lines, Incorporated.

You may now retire.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTS TO CHARGE.

As To Negligence.

1. In each cause of action, the plaintiff has the burden of proving by a fair preponderance of the credible evidence that the defendant was negligent and that the defendant's

negligence was the proximate cause of his alleged injuries. If you find that the evidence in any cause of action is evenly balanced in regard to either negligence or proximate cause, your verdict must be for the defendant on that cause of action.

[fol. 135] 3. As to the first cause of action the defendant's duty was to exercise reasonable care to furnish the plaintiff with appliances which are reasonably safe.

5. Defendant had a right to rely on plaintiff reporting any absence of light which the plaintiff observed.

6. If the jury find that there was an absence of light and that the plaintiff knew that there was a dangerous condition the jury may also find that the plaintiff was negligent in failing to correct the condition or to report it to the proper authority for correction.

7. There is no duty on the defendant to explain how the accident to the plaintiff occurred.

8. The jury may not speculate as to how plaintiff's accident occurred.

9. The jury may not assume that merely because plaintiff had a fall that defendant was negligent.

10. It was not incumbent on the defendant to treat the plaintiff as if he were in swaddling clothes and unable of using a modicum of care for his own safety (*Larson v. U. S. A.* 1950 AMC 176).

16. If the jury finds that the sole cause of plaintiff's accident was plaintiff's inadvertence, even though it did not amount to negligence, your verdict must be for the defendant.

17. If you find that the plaintiff failed to exercise care for his own safety and that such lack of care was the cause of his accident, the verdict must be for the defendant.

[fol. 136] As To The Second Cause Of Action.

19. Plaintiff asserts that he suffered additional injuries because a fellow seaman, Richards, failed to maintain a continuous watch over plaintiff while Richards absented himself to notify the ship's officer on the bridge, of plaintiff's predicament.

20. Before the defendant can be found liable for any injury suffered by plaintiff in a fall from the lookout platform to the platform below, it must first find that plaintiff did fall.

21. The jury must also find that the fall was due to negligence on the part of Richards.

22. When considering Richards' conduct it must be judged from what appeared to be the situation at the time Richards went for help.

23. In considering Richards' conduct, the jury may take into account the fact that plaintiff assured Richards that plaintiff could take care of himself.

24. Richards' conduct must not be judged from hindsight. Thus if the jury should feel that perhaps a different result might have taken place if Richards had remained with plaintiff it may not on such assumption conclude that Richards was negligent for failing to remain with plaintiff.

25. If the jury find that Richards made a mistake or error in judgment and no more, there is no liability on the defendant for the consequences of such mistake or error because such mistake or error is not negligence and negligence is the only basis on which plaintiff can recover under the second cause of action in the complaint.

26. Thus if the jury should find that plaintiff suffered injuries in the fall from the lookout platform to the platform below but should also find that such fall was not due [fol. 137] to negligence of Richards, it may not award any damages for injuries so sustained.

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General

34. The fact the court had denied motions made by either party is not an indication the court believes the other party's side of the case but is merely a ruling on a question of law and has no other significance.

Mr. Connor: Does your Honor wish me at this moment to mention objections which I did not rise to take during Mr. Klonsky's summation?

The Court: Yes.

Mr. Connor: During Mr. Klonsky's closing address, at the beginning, Mr. Klonsky said that if the plaintiff had called the bridge to report the lights were out, he would have been chastised for doing so. There isn't a single bit of evidence to support that statement. I think it was highly improper, and except for your Honor's instruction, I certainly would have said something.

The Court: I think this is a more orderly way to do it. I wouldn't have done anything about it. It is already done. What is the use of aggravating the matter before the Jury?

Mr. Connor: I think the Jury should be instructed there is no evidence to support that.

Mr. Klonsky: I said this was a well-known condition and that they should use the phone for something new.

The Court: I will not rely on that.

Mr. Connor: He talked about rough service bulbs. There is no evidence in the record to support the contention rough service bulbs would have functioned better on the ship than any other kind of bulbs. There is not a single bit of evidence. He said that I had charged that the plaintiff [fol. 138] had within him seeds that came out. I never made any such statement.

He said on several occasions that I wanted the Jury to throw the plaintiff in the street. I think that is a most unfair statement about what I said, and I think it is an appeal to passion and prejudice and highly prejudicial to the defendant. I think the Jury should be instructed that there was no such contention.

The Court: I think I gave a pretty strong instruction on that. That was intended for the benefit and to the detriment of both of you.

Mr. Connor: I take that position, your Honor.

The Court: You take any position you want. You make your record. I have been doing this quite a while, too.

Mr. Connor: I except to so much of your Honor's charge in that you said in words or substance that the Jury can find the defendant negligent or the vessel unseaworthy because of defective wiring on the ground that there was no such evidence in the case upon which the Jury could make such determination.

I also except to that part of your Honor's charge—and you repeated this on a number of occasions, what I have just mentioned and what I am going to say now—that the defendant could be found negligent or the ship unseaworthy on proof that the electrical fixtures and other appliances were not fit, or that they were negligently furnished.

I also except to that part of your Honor's charge in which you said in words or substance that the Jury might find the defendant negligent or the ship to be unseaworthy for failure to furnish railings or handrails.

I except to so much of your Honor's charge in which you said in words or substance that the defendant would be charged with any negligence on the part of Richards in attempting to effect a rescue.

Your Honor charged the Jury that the plaintiff could not be blamed for working in an unsafe place. I except to [fol. 139] that because it is not complete. If the place where the plaintiff was working was unsafe by reason of his own negligence, then he can be charged with it.

The Court in charging the burden of proof I believe limited the consideration of burden of proof to considerations of unseaworthiness or negligence, whereas the same measure of proof was not required as to the damages. In other words, I don't think your Honor made clear to the Jury that in considering whether or not the plaintiff is entitled to damages, his proof must be by a fair preponder-

ance of the credible evidence, and also, of course, as to the extent of any damages.

With respect to whether your Honor wants me to name these, I except to your Honor's failure to charge the last sentence in my request to charge, number one, dealing with the situation where if the evidence was evenly balanced and the plaintiff could not recover and that the defendant would be entitled to a verdict.

I don't think it was made clear to the Jury that in connection with the claim of negligence the only requirement on the part of the defendant was to exercise reasonable care to furnish a reasonably safe place and reasonably safe appliances. I except, therefore, to your Honor's failure to charge with respect to number *three*.

Your Honor indicated that you would in substance charge number *five* and number *six*, and I except to that.

Also, you said you would charge in substance number *seven*, *eight* and *nine*, none of which I submit your Honor has charged, and therefore I take exception.

Your Honor failed to charge number *ten* and said you would not charge. I except to that.

I except to your Honor's failure to charge number *sixteen*.

In respect of charges requested by the defendant, number *twenty-four*, which deals with the way the Jury should view Richards' conduct, your Honor said you would give it in substance, and I don't recall that it was, and therefore I except.

[fol. 140] Your Honor said you would not charge number *twenty-five*, and I except to that.

I had asked your Honor to charge in respect of the elements of damage and the fact that certain motions had been denied. In other words, I asked your Honor to charge the Jury the fact that you mentioned elements of injury to the Jury should not be regarded as an indication that you had any feeling about the matter one way or the other.

The Court: I told them. Didn't I tell them if I mentioned it it was my duty to do it along with all the other issues in the case? I did.

Mr. Connor: I may have missed it.

The Court: I had that in mind. Maybe so.

Mr. Connor: The same in respect to the denial of various motions.

The Court: I never say anything about that.

Mr. Connor: I must add here, your Honor, that I was quite concerned with respect to the number of times in which your Honor mentioned the elements upon which plaintiff claimed the right to recover damages. I didn't keep any record of it, of course, but it seems to me that the numerous repetition of those charges is prejudicial to the defendant as indicating a view on your Honor's part that these charges had substance and should be accepted by the Jury.

The Court: I certainly had no intention of doing that. But what is done is done. I felt it is a little complicated—and it was for me. Three causes of action itself is not complicated, but there were three parts to the first cause of action, the two views of the plaintiff about his second cause of action, and then unseaworthiness based upon the first and second causes of action and conditions therein existing, if any they found and I was trying to make it crystal clear to the Jury what it is we were expecting them to address themselves to and to accomplish. Be that as it may, of course, you have your exceptions.

[fol. 141] Since you raised the question of the burden of proof, I think I will charge them with that in the morning. I won't charge them now because it is too late.

You said I didn't address myself in the charge on the burden of proof on the subject of damages.

Mr. Connor: That's right.

The Court: I don't want to have anything wrong with the charge on a simple thing like that. While I am doing it, I will say the burden is on the defendant to produce evidence which the Jury believes and which satisfies their minds by a preponderance thereof, that there was contributory negligence in the case. I will do it more artfully, of course.

Mr. Connor: I dislike the term "contributory negligence," because it implies by its very terms that the defendant also was negligent. May I suggest to your Honor

that when you do give that charge, instead of labelling the contributory negligence, you label it plaintiff's negligence?

The Court: I have already referred to it as contributory negligence. I think I will do it in terms I have already charged.

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ADDITIONAL CHARGE OF THE COURT

The Court: I called you back to say two or three small things to you before you commence your deliberations.

In the first place, as I talked with you, I told you there were three causes of action in this case. I may have emphasized that so strongly that you may be under the impression that you are to say something in your verdict about each one of those causes of action. That is not true. All that is necessary is that you bring in a general verdict, if that is the state of your mind in this case; that is, a verdict for the defendant, if that be the state of your mind, or a verdict for the plaintiff, if that be the state of your mind, and assess the plaintiff's damage.

[fol. 142] Your verdict must be unanimous if you arrive at a verdict. All of you must agree upon it. I don't mean to say that I am ordering you all to agree. Of course I am not. If that be the state of your minds, you may disagree and not arrive at a verdict. But if you arrive at a verdict, it must be a verdict of all eleven of the jurors.

Counsel have stipulated to go ahead with eleven members on the Jury because of an accident that happened to one of the jurors last night. We will go on without him.

With respect to the burden of proof, I have one small word to say to you, too. I told you yesterday the burden of proof is upon the plaintiff to satisfy your minds by a preponderance of the evidence that the accident occurred as claimed with the plaintiff and that the accident was the cause or one of the causes, bearing in mind what I told you about that, of the injury. I neglected to say to you that the plaintiff also has the burden to satisfy your minds by a preponderance of the evidence on the question of damages, that is, how much he is to receive at your hands, following, of course, what I had to say about damages yesterday.

In addition to that, I want to say to you that I neglected to say that the defendant has the burden to produce evidence which satisfies your minds by a preponderance thereof that the plaintiff was guilty of some negligence, if any there was, which contributed to cause his injury. What I am saying in short is that on matters that the plaintiff claims, he has the burden; on the matter the defendant claims, namely, the plaintiff was himself negligent and that negligence contributed to cause his injury on that, on that, the defendant has the burden to satisfy your minds about preponderance of the evidence.

Is there anything else you gentlemen think I ought to say to this Jury?

Mr. Connor: No, your Honor.

[fol. 143] The Court: Thank you, ladies and gentlemen. The marshal will now take you to the jury room to commence your deliberations.

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MOTION TO SET ASIDE VERDICT

Mr. Connor: The defendant moves to set the verdict aside and moves for a judgment in accordance with its motion for a directed verdict.

I also move to set the verdict aside on the ground the jury arrived at its verdict on an improper basis. After the jury was dismissed, out in the hall some of the jurors were standing about and questioned Mr. Rabson as to what fee he would exact in connection with the result and Mr. Rabson said one-third.

Juror No. 2 said, "That's what we figured, and we allowed for that." Obviously, then, the jury arrived at its verdict on a wholly improper basis by not only awarding damages to the plaintiff, but also allowing for attorneys' fees. If your Honor needs any testimony in that respect, I shall be glad to give it myself as well as my associates, and I am sure Mr. Rabson would agree that that is what happened.

The Court: Well, you can make whatever record you want on it, but I shall deny your motion.

Mr. Connor: I will be glad to make the record if your

Honor wants me to take the stand, unless Mr. Klonsky or Mr. Rabson agrees that that is what happened.

Mr. Klonsky: I don't believe it is proper to put on the record any conversation that occurred with the juror after the matter is concluded and a decision has been rendered. There are many decisions on that and it is improper to use that as a basis for a new trial. There are many decisions emanated from our court of appeals which says that a jury cannot consider things of this nature, and if we were to take up every possibility of what the jurors discussed and took into account in the jury room, we would never have a verdict.

[fol. 144] The Court: It is improper for a juror to make that remark.

Mr. Klonsky: It is improper procedure to make that remark on the record, too.

The Court: I understand the law to be that what transpired in the jury room in their deliberations is not a basis for a new trial. Of course, if the verdict had been arrived at by lot, by taking figures and dividing by eleven or something of that sort, that is different. But this kind of a thing, as to this, I have had this sort of situation before and I have looked into the law a bit and I believe the law to be that this is not a ground upon which to set aside the verdict or to reduce it. I don't preclude you from making any record you want to make about it, but that will be my ruling upon it.

Mr. Connor: If your Honor please, I will be glad to take the stand or I will put Mr. O'Neill on and ask him.

The Court: You do just as you please.

JAMES P. O'NEILL was called as a witness by the company and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Connor:

Q. Mr. O'Neill, are you a member of the Bar of the State of New York?

A. I am.

COLLOQUY

Mr. Klonsky: Before we even start, in as much as Mr. Connor has indicated the purpose of this testimony, may I please note an objection, which will stand to the entire testimony as to the procedure being taken, on the fact that it is not a proper part of the case and that this is not properly part of the record, and that the plaintiff objects?

The Court: I would be inclined to sustain that objection.

Mr. Connor: Your Honor said I could make a record.

The Court: I will sustain any objection to any further proceeding on this matter.

[fol. 145] Mr. Connor: May I make an offer of proof?

The Court: You have already made it.

Mr. Connor: I haven't yet, your Honor.

I make an offer of proof that what I said with respect to the statements of Juror No. 2 were said in the presence of Mr. O'Neill, in my presence, and in the presence of Mr. Jourda of my office, and also in response to questions of Mr. Rabson, attorney for the plaintiff.

Mr. Klonsky: Now, your Honor, I think we have come to the fourth cause of action.

The Court: That is right.

Mr. Klonsky: That relates to maintenance. I respectfully call your Honor's attention to a recent decision from our Court of Appeals, published in 1960 AMC 1816, called Bartholomew versus Universe Tank Ships, Inc., decision rendered on June 21, 1960, wherein the Court of Appeals pointed out that regardless of the verdict rendered by the jury on negligence causes, if it has not been given to them to determine the maintenance and cure, eight dollars a day here, that this is a separate and cumulative cause of action for the Judge if he takes it unto himself, which was done here, to resolve that cause of action.

I have spoken to Mr. Connor, and I believe what he told me before he will agree with now, that the basis of determination of maintenance will be at the rate of eight dollars a day for those days that he is deemed not to have yet attained the maximum benefits of medical attention.

Mr. Connor: All I stipulated was that the fair and reasonable maintenance and cure rate was eight dollars a day. I do not concede that the plaintiff is in any sense disabled or requiring any further treatment.

Mr. Klonsky: I didn't say you stipulated that.

Mr. Connor: That was implicit in what you said.

Mr. Klonsky: I respectfully submit, your Honor, that what we should do is figure all the days of out-patient [fol. 146] treatment, deduct therefrom the days that he served as a seaman, which was six weeks on the S.S. *Santa Paula*; also deduct from the sum the amounts already paid, which Mr. Connor, I believe, has a voucher for. He can give us the exact figure; and then project the probability of future out-patient treatment based on the medical facets of this case as known to your Honor and as appears in the medical records and also from the doctors who testified for an additional three years. I think that would be a fair determination as to his future course of out-patient treatment needed both with respect to his back and eventually again with respect to his mental condition.

Mr. Connor: There is not a single bit of evidence in respect to any future maintenance. No doctor has testified that the plaintiff requires any further treatment. The hospital records are replete with statements that the hospitalization is of no value to him.

The Court: What about the fact that the last time he was over there at the Marine Hospital the report is that he is not fit for duty?

Mr. Connor: That does not mean that he is entitled to maintenance. If he has reached maximum medical benefits and there is no evidence one way or the other about it, then no award for maintenance can be made. It is quite true, as the Supreme Court said in the Farrell case, that a man may require treatment in the future. But there has to be some evidence of it. There isn't a single bit of medical evidence in this case that the plaintiff requires any further treatment to cure his condition. If the treatment were just to continue him along the way (sic) was, he would not be entitled to maintenance.

Mr. Klonsky: May I be heard on that?

The Court: Yes.

Mr. Klonsky: We do know from the last entry in the hospital record he is to return again on December 16, 1960, without any indication that that is to cease then. In fact, if you look upon the entire medical background of this [fol. 147] man, it is something that will continue for quite some time yet into the future. He is undergoing a period of vocational rehabilitation. That in itself is a form of treatment, showing that he has not attained the maximum benefits of medical care. I do submit respectfully, sir, that as a question of fact, which the Court has taken upon itself in this fourth cause of action, there is sufficient in the medical proof in this case, both from the doctors and from the hospital records, that conservatively he will need at least another three years of out-patient care.

Mr. Connor: Just to the contrary, the records show it was recommended to the plaintiff that he should seek and obtain rehabilitation, but he did not. In the case of Donovan against Standard Oil Company, or Esso Oil Company, the citation I do not have, it holds that where a seaman fails to accept rehabilitation, he has lost his right to future maintenance.

The Court: It seems to me that the poor man ever since the accident in 1958 has been trying to get relief from this condition, trying to get some assistance, to get well, to get on his feet. He made a couple of attempts to go to sea, which were unsatisfactory. There is a report in the medical record that he is still not fit for duty. He has a rehabilitation program to go through. There is a long medical history here, exhaustively gone into on the trial of this case. In my view he has not reached that point where maintenance should be cut off. At this time my judgment is three years is a reasonable time within which to anticipate that he is going to need it, and I am going to allow it upon that basis, and on the basis of the eight dollars a day.

Mr. Klonsky: So it becomes a matter of mathematics?

The Court: You work it out and I will sign the order.

Mr. Connor: I will respectfully except. There isn't a scintilla of evidence that supports such a decision.

The Court: My dear Mr. Connor, I think the record is replete with evidence that supports that conclusion.

[fol. 147a] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civ. 134-261
Docket No. 26875

JAMES VICTOR SALEM, Plaintiff-Appellee,
against
UNITED STATES LINES COMPANY, Defendant-Appellant.

Appendix to Brief for Plaintiff-Appellee
—Filed May 4, 1961

[fol. 148]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JAMES VICTOR SALEM, Plaintiff,

against

UNITED STATES LINES COMPANY, Defendant.

AFFIDAVIT OF ROBERT KLONSKY IN OPPOSITION TO MOTION
State of New York,
County of Kings, ss.:

ROBERT KLONSKY, being duly sworn, deposes and says:

That he was trial attorney for the successful plaintiff herein, fully familiar with all the facts and proceedings herein, and makes this affidavit in opposition to defendant's ill-conceived motion under Rule 50(b).

It is apparent to anyone familiar with the trial record herein that the issues raised in the three affidavits submitted by defendant are without basis in fact and law. Not only are they afterthoughts in a desperate attempt to assail a general and unanimous verdict where no prior request was made for a special verdict, as provided for in the Rules; but their thrust is unfair commentary on a record bespeaking meticulous fairness by an experienced and competent trial Judge. To know the record is to conclude that defendant was actually favored when plaintiff's motion for a directed verdict was not granted at the close of proof.

[fol. 149] Here we visualize a seaman on his way to the crow's nest in the radar tower, the sole remaining light on the platform going out just as he had stepped thereon, after numerous complaints having previously been made as to the defective condition of the lights and sockets. The two upper lights that would have cast some illumination downwards to the platform had not been functioning for months

Before, and though defendant stated in answer to an interrogatory propounded by plaintiff that skid-proof paint had been recently applied on the smooth metal surface whereon plaintiff slipped and fell backwards to strike his lower back and head, with the dorsal part of his body bridging the open space between the ladder and platform, yet this was proven false at trial when defendant's own witness, the Bos'n, testified that the paint applied to the platform several months before was actually a non-abrasive, non-skid proof aluminum paint. What more was needed to seal the verdict than defendant's witness Chief Officer Ridington who conceded on cross-examination that the platform was *unsafe* when the light went out, leaving the radar tower in absolute darkness while the vessel was coursing a winter sea, pitching and rolling in the manner described in the ship's log? All this is buttressed by the many witnesses called by defendant, the trial Court indulging defendant by sitting until 7:45 P. M. without a dinner break to allow them all to be heard, particularly with respect to the unusual number of light failures, averaging 500 to 600 each day while at sea, prompted by excessive vibration, being replaced by ordinary household bulbs instead of rough service or anti-vibration bulbs. In essence not one of defendant's factual witnesses, by their testimony and statements, favored defendant's position. In this context we can understand defendant's motion to be the product of a desperate advocacy where the facts and law clearly and convincingly support the verdict and the subsequent rulings on defendant's similar motions.

[fol. 150] It is remembered that at the start of trial deponent and defendant's trial counsel, Walter X. Connor, Esq., conferred with the Court as to whether plaintiff might elicit testimony related to plaintiff's family background, particularly that his wife had left him after the accident and was ultimately divorced, leaving him with the care of 7 minor children, one crippled. Mr. Connor did not agree, probably in the belief that it would be prejudicial to defendant, and so it was left. Whether this side bar conference and admonition were recorded is presently unknown, but the transcribed record will show that deponent, while examining his medical expert Lawrence Kaplan, M.D.,

asked whether plaintiff's family background and the effect of stress by trauma should be part of a hypothetical question related to the plaintiff's psychiatric condition, and on the witness' affirmative answer, the learned trial Court, again in deference to defendant's contention that it would be prejudicial, directed nothing be said further. Mr. Connor had either objected or remained silent at that point in reliance on his prior position on the issue.

Again later, while reading from the hospital records, Mr. Connor asked that the reporter note an entry related to plaintiff's marital problem, as well as the children, and when deponent stated he would not object to having this read to the jury, Mr. Connor declined. Deponent remembered that at this point counsel approached the Court out of the jury's hearing, and it was then stated for the record that there had been an understanding from the beginning that this was beyond the pale of testimony.

Now, completely contrary to the position defendant had taken from the beginning of the trial on admitting testimony of plaintiff's marital and family situation, which conceivably would have been accepted by the jury more favorably for the plaintiff, defendant inconsistently urges as an issue on its motion the Court's admonition and rulings in its favor.

[fol. 151] Equally without basis is defendant's contention on the second cause of action related to the second incident when the relief A/B Lookout Richards negligently left the apparently dazed and seriously injured plaintiff to sit on a narrow ledge with his feet dangling in the open space thirty feet deep, in absolute darkness, while he went *into* the crow's nest to telephone for help. It was clearly foreseeable that plaintiff would fall again, which he did for a distance of 8 to 10 feet. Issues of fact were raised in several respects, including the manner of leaving plaintiff alone on the platform. In court Richards testified he had placed both legs of plaintiff on the platform, whereas in a written statement given less than one month after the accident the witness stated plaintiff's legs were left dangling in the open space; also in the statement it appears that plaintiff at first did not answer Richards' several requests whether he could be left alone until he finally said "I believe

so,"—and Richards' negligence in failing to pull plaintiff further towards the crow's nest and away from the opening, and use the telephone from a position on the platform, not reaching into the crow's nest for the receiver as he could have done while closer to plaintiff with both on the platform, are all clear in the record.

On this defendant was not heard to object to the instruction that the jury need not consider the second cause of action at all if it found for plaintiff on the first cause of action for Jones Act negligence, or the third cause of action for unseaworthiness, as all damages, including those from the second incident that involved Richards, would be deemed consequential and causally related.

Where defendant failed to request a special verdict or answers to special interrogatories, how can it be heard now to complain "Since it cannot be determined upon what the jury based its damage award, the verdict should be set aside"?

[fol. 152] Other contentions by defendant are equally baseless. The Court's fair comment on the testimony of the need to replace 500 to 600 bulbs each day because of vibration was within his prerogative, something so obvious that probably everyone in the courtroom reacted similarly. Nonetheless, any harm this truth may have done defendant was properly removed by the Charge wherein the Court stated that the Jury alone was to determine the facts regardless of what counsel or the Court may have said thereon. 7

As to the substance of the Charge, reciting what plaintiff contended and defendant denied, there can be no fair criticism. In advance of its delivery the Court read to counsel much of his Charge and defendant's counsel was not then heard to complain on its form. Certainly it is the proper function of the Court to word his Charge within the framework of the Law, as he did, and it is unfair to criticize it for its clarity and assistance to the jury in determining where the truth lies. Allied to this assault on what the trial Court deemed proper and within the exercise of his functions, is the contention, equally strange, that a certain model made by defendant should not have been excluded. Whether a model or any other piece of demonstrative evidence should be shown a jury is a time honored exercise of

the trial Court's discretion. To have seen this wooden model, with some of its interior portions clearly different than the cable and wiring that were shown in the photographs in evidence, and the deceptive nature of a wooden floor wherein fact the culpable platform was smooth and worn metal, further deceptive in that the Jury could not have visualized from the cut-away model of the platform alone how it was related to a 30-foot drop between it and the ladder, demonstrates in fact that its reception would not have assisted the jury in its function. The photographs and blueprint to scale of the radar tower, in evidence, were sufficient for that purpose.

[fol. 153] Defendant errs in stating deponent made prejudicial comment in summation. Fair comment is not prejudicial, and a responsive summation to what had been said by defendant's counsel is required and customary. It is remembered, among other virulent remarks, that defendant's counsel sought to enlist the jury's sympathy, and to couple it with prejudice, by referring to the union affiliations of the plaintiff and the witnesses, including its own witnesses, capped off with the untoward designation of the jury as trustees of "the defendant's money." Denigrating plaintiff's status as a sedentary seaman enjoying extended "coffee breaks," the attack on his credibility as to the accident, and statements taken from him while under gross sedation, despite the unquestioned fault of defendant, the failure to transmit the entire ship's hospital record to the Marine Hospital doctors and even its own medical experts for proper treatment and diagnosis, and the unfair references to "malingering," "simulation" and building up his obvious injuries, are but some of the examples of defendant's desperate defense and summation technique. On this deponent stated that plaintiff did not want sympathy from the jury, but likewise did not deserve cruelty, either from them or Mr. Connor. That defendant cites this as a reason to have its motion granted bespeaks the worth of this and its other unsupported contentions. Though deponent's remark was called for by what was stated in the preceding summation, yet we quote Mr. Justice Brown's observation in *Dunlop v. U. S.*, 165 U. S. 486, 498, as follows:

"If every remark made by Counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial even the most experienced counsel are occasionally carried away by this temptation."

[fol. 154] The remaining issues on this motion are so clearly in favor of plaintiff that they deserve short comment. That the verdict is not excessive must be apparent from visualizing the record in the light of a unanimous jury verdict that favored plaintiff; not yet 38 years of age when injured. Both plaintiff's medical experts testified that he causally suffered a ruptured intervertebral disc, a severe personality disorder which at one time prompted an impartial U. S. Public Health Service diagnosis of "Schizophrenia, undifferentiated type," and that he would be permanently unfit for sea duty. Defendant's own medical experts would not venture their opinions. Plaintiff's striking and dramatic physical incapacities are compared without contradiction to his apparent physical and mental well being prior to the accident of February 16, 1958, including two years service for defendant without sickness or complaint. That he is still not fit for duty and must return for further outpatient treatment are recorded in the hospital record. The motion pictures taken by defendant's investigators for the period from February 1959 to November 1960 graphically illustrate plaintiff's worsening condition, ending in an apparent limp, the need of a cane and back brace for ambulation. As a finding of fact on the fourth cause of action for maintenance, reserved to the Court without objection, it was fair and conservative to project plaintiff's future need for medical care and attention to the next three years. To argue otherwise is to disregard ruling decisional law on this subject. See: *Bartholomew v. Universal Tankships Inc.*, 279 F. 2d 911; *Brown v. Pravo Corp.*, 258 F. 2d 704, aff'd 157 F. Supp. 265; *Gibson v. U. S.*, 100 F. Supp. 954, aff'd 200 F. 2d 336.

Finally we turn to the assault on the jury verdict by what was overheard after the jury had announced its verdict and had been dismissed. It is clear that jury delibera-

tions are *in camera*, and a verdict, particularly a general [fol. 155] verdict, cannot be upset by testimony on what may have been discussed in the jury room. The trial Court properly sustained objection to defendant's attempt to impeach the verdict in this regard. See: *Rafando v. Isthmian Steamship Co.*, 243 F. 2d 581 at p. 583; *Hyde v. U. S.*, 225 U. S. 347; *Clark v. U. S.*, 289 U. S. 1; *Stein v. People, State of N. Y.*, 346 U. S. 156; *Jorgensen v. N. Y. Ice Machinery Co.*, 160 F. 2d 432; *Wigmore on Evidence*, Sec. 2349.

That a juror may have taken into account that a client must pay his lawyer is the weakest reason yet advanced for impeaching a verdict. The exercise of common sense by a juror in the jury room on questions that may be taboo in the courtroom cannot be the basis of reversal. See: *John R. McWetney v. New York, etc.*, 282 F. 2d 34 at p. 38.

On the respect to be accorded a jury's verdict as to amount, see:

Delaney v. N. Y. Central R.R. Co., 68 F. Supp. 70, 73-4;

Scott v. Baltimore & Ohio R.R. Co., 151 F. 2d 61, 64-5;

Jones v. Atlantic Refining Co., 55 F. Supp. 17, 20;
Schirra v. Delaware R., 103 F. Supp. 812, 823.

Perhaps too much has been written above on obviously ill-conceived and unsubstantiated grounds for defendant's motion. Suffice it to say the learned trial Court was eminently fair to both sides, defendant cannot be heard to complain on a clean and clear record of its unquestioned fault and damages as assessed, and that defendant's motion should be denied in its entirety.

Robert Klonsky

(Sworn to December 6, 1960.)

[fol. 156]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TESTIMONY

Salem?—Direct.

"Latitude 40 degrees, 31 north; longitude 39, zero west; James V. Salem, Article No. 28, Lookout, AB, Z-No. 341954, injured from apparent fall in radar tower while on duty; diagnosis, possible fracture vertebrae; treatment, traction, demerol; prognosis, undetermined." Signed by the executive officer, the ship's surgeon, and the master.

Mr. Klonsky: Here, under date of February 16, 1958, from 0000, which is midnight, to 0400, which is 4:00 a.m.: "Routine inspections and reports. Strict lookout and fire watches maintained. 0300 retarded clocks thirty minutes. 0256"—there are some numbers here. "Vessel rolling and pitching easily"—

"Vessel rolling and pitching easily in a rough west northwesterly sea and moderate average northwesterly swell (maximum roll 7 degrees P - 6 degrees S)" I suppose that's 7 degrees portside and 6 degrees starboard side. "Overcast with passing rain squalls."

It states here: "Full extent of injuries not yet determined." This is the ship's medical officer's report. "Probable fracture or dislocation of vertebra with spinal nerve injury. Paralysis and anesthesia right leg. Concussion of brain. Sedation, bilateral traction of both legs; hospitalized 16 through 18 of February, '58."

"Was seaman given an 'off duty' slip; yes. If so, by whom; Dr. Fenger; was seaman sent to shore hospital or [fol. 157] treated, yes—USPHS." That means United States Public Health Service Hospital.

Q. Did you take a physical examination by a company doctor to see if you were fit to serve as a seaman?

A. Of course.

Q. Did you take several after that?

A. Yes. I think two or three. I went on two or three trips, and every time I come back I have a physical examination again, yes.

Q. Mr. Salem, when you joined the S.S. United States in September of 1956, what was your job then?

A. I joined as an ordinary seaman.

Q. Ordinary seaman?

A. Yes; but because I have a good record on the ship, so he give me from ordinary seaman to lookout AB. That was about a little bit after some months. I lookout AB after the last time.

By Mr. Klonsky:

Q. I want you to tell me—slow down—what you saw with your own eyes for several months before your accident about the two lights that were below the crow's nest, what you saw.

A. All right. I will talk about myself. I won't talk about the other two fellows.

Q. Just what you saw.

A. For me, every time I relieved the man, one of the lights is out. I did ask him.

Q. That is enough. Was there a time before your accident where you replaced a bulb?

A. Yes, I believe I did at one time.

Mr. Klonsky: If your Honor will look at the very first photograph in the group, you will see that the black is like a "Y," when you look down on it.

The Court: That was not there?

[fol. 158] The Witness: That was not there. That must have been put there after the accident.

The Court: What do you mean by the "Y"?

Mr. Klonsky: Can I hand this up, your Honor?

The Court: Yes.

Mr. Klonsky: Looking down you will see like a big "Y" with a fat bottom to it, around the edges and the platform itself.

The Court: That is a painted thing.

Mr. Klonsky: That's right.

The Court: I see.

Mr. Klonsky: We can agree that these photographs were taken on October 31, 1958?

Mr. Connor: That's what it says.

Mr. Klonsky: That is the date here, about six months after the accident.

Mr. Connor: Yes.

Q. Mr. Salem, this first day you were in the hospital, the 16th, do you recall you were put in traction and they gave you medicines?

A. Yes. I was in the bed, but they put me still in a traction.

Q. There were weights on your feet?

A. On two feet there was weights, and these two hands was tied up, and they gave me some fluid in a bottle, and I was dopey. They gave me shots. Every time I holler for pain, they give me needles, needles. I have been dopey. They make me sleep.

Q. The ship was going toward New York?

A. Yes. When the wind hit the ship, every time I start to hurt. I called again. Every time I screamed, they give a needle again to me.

Q. Did you give statements on that day to the ship? Did somebody come around for your statement and your [fol. 159] signature?

A. I tell you even up to now I don't remember exactly, because I was not feeling good there.

.

Q. What was your intention when you returned from your coffee break with respect to that telephone on the bridge?

Mr. Connor: I object to that.

Mr. Klonsky: That is as to his course of conduct.

The Court: You are not asking that. You are asking about a state of mind, which I don't see has any bearing on this subject. Let's get at what he did, what happened, what he saw.

Q. How many lights were out? The same as before?

A. The four.

Q. The two lower lights and the two top ones were always out?

A. Yes.

Q. How do you feel when you gave those statements?

A. I just told you. I was dopey.

Mr. Klonsky: That's all.

Your witness, Mr. Conor.

Barton—Cross

Q. Usually you handle those halyards with ropes that are outside the radar tower, isn't that true?

A. We call them lines, yes, sir.

Q. In fact you rarely have to go into the radar tower to handle those halyards.

A. Yes.

Q. And certainly you have nothing to do with the look-out.

A. None.

Q. When you are going to check the radar tower, you are going to climb it all the way up and down every time you check it?

A. No, sir.

[fol. 160] Q. You just go inside and look up and walk away, isn't that true?

A. That's correct.

Q. Didn't you say this? I will read this to refresh your recollection. "Yesterday afternoon"—yesterday afternoon—by this statement would be the 15th of February—"at about 1500 hours"—which would be 3:00 p.m.—"I was in the lower section of the tower putting the flags for arrival in New York in their respective pigeon holes and the lower light in the tower near the flag locker was burning

all right. I did not notice whether the upper one were lit or not." I show you this.

A. I take your word.

Q. All the other lights you didn't see whether they were on or off?

A. Not with my own eyes, no.

Q. Is an open door at 3 o'clock in the afternoon sufficient for light for the pigeon holes?

A. I would say it would be, under normal conditions.

Q. You are a quartermaster. You steer the S. S. United States?

A. That's right.

Q. In February you are going through a winter sea, are you not?

A. That's right.

Q. The S. S. United States prides itself on its speed, isn't that true?

A. That is true.

Q. There was a great degree of vibration, was there not, in the performance of this ship, particularly in the winter sea, while going at great speed?

A. That's correct.

Q. More than the other ships, Mr. Barton? That is the question.

A. In proportion?

Q. Yes.

A. No. In actuality, yes.

[fol. 161] Q. This particular radar tower stands over 60 feet straight up, like a tree, on the bridge deck, doesn't it?

A. Yes.

Q. Within it are wires, many wires that affect the lighting as well as the radar functions of the vessel?

A. Yes.

Q. Vibration affects wires, isn't that true?

A. I should think so, yes.

.

Recross examination.

By Mr. Klonsky:

Q. If there are any lights or any difficulty with sockets, are you the one to whom complaints would be made?

A. Not necessarily, no, sir.

.

D'Andrea—Direct

Q. Did you make any inspection of the wiring in the radar tower after Mr. Rivas had done the replacing of the sockets and so on?

A. I was satisfied that the lamps were—

The Court: Wait a minute.

Q. Just did you make an inspection?

A. No.

.

Q. They are household lamps. The kind of lamps you put in our homes are the kind of lamps you put on the ships?

A. Yes.

Q. Have you ever heard of an antivibration lamp?

A. We call them "rough service."

Q. Do you now have any recollection whether you had these rough service lamps in the radar tower before February 16, 1958?

A. I have no recollection, no.

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D'Andrea—Cross

Mr. Klonsky: I do know, your Honor, in answer to my interrogatories they did not mention this gentleman's name as having given a statement. I refer to interrogatory 14, [fol. 162] which I read. The only names listed were Salem, Thum, Gregware, Barton, Rivas and Richards. This man's

name was not mentioned, and now he says he did give a statement.

Mr. Connor: Here is a statement.

The Witness: I didn't say I gave a statement.

Mr. Connor: He is talking about me.

The Witness: Oh.

Q. You said you gave a statement.

A. No, I didn't.

Q. I have a statement here now.

A. I wasn't sure.

Q. Is this your signature, Mr. D'Andrea?

A. Yes, that is my signature.

Q. Then you gave a statement.

The Court: What is the date of it?

Mr. Klonsky: February 16, 1958.

* * * * *

(The statement of Mr. D'Andrea above referred to was marked Plaintiff's Exhibit No. 11 and received in evidence.)

* * * * *

Q. Just after the plaintiff, Mr. Salem, had been removed from the radar tower, the same morning, the same day.

A. Yes?

Q. Is it true? Do you have any recollection of going there?

A. Yes, I went there.

Q. What did you find when you went there?

A. That the lights were burned out.

Q. All of them?

A. Yes.

* * * * *

Mr. Klonsky: "I was told that two men from the engine room had already gone up there. I went up there to see if I could find the two men and to find out what needed to be [fol. 163] done. When I got to the bridge, I found that the two men had already been sent back to the engine room. I went up to the radar tower to see what the situation was. When I arrived there, I found that they were using flash-

lights to light the interior of the radar tower. I then went to get some lamps and an extension cord to supply some light. When I got back to the radar tower the man that was injured had already been lowered down to the deck. After the tower was cleared, I replaced three burned out lamps in the tower. I saved these lamps until the morning so I could test them to make sure they were burned out. They were. This statement was taken by me on board the S. S. United States, at Pier 86, North River, on June 10, 1958."

.

Q. I am referring to five sockets. There are five in that radar tower.

A. Yes.

Q. The truth of the matter is that when you got there the place was in pitch darkness and flashlights had to be used. Is that true?

A. True.

.

Q. When you looked at these bulbs, the ones you tested, were they the regular household bulbs that you put up in your house or were they what I call antivibration bulbs and you call rough weather bulbs, rough service bulbs?

A. They were ordinary.

Q. Ordinary household bulbs?

A. As we used throughout the entire ship.

.

Rivas—Direct

The Court: I don't think it is material whether he hands them out. You can get at it more directly, if you want to.

Does anybody else put those bulbs in besides you?

The Witness: They are not supposed to.

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[fol. 164]

Rivas—Cross

Q. Do you sometimes supply lights to the members of the crew, that is, supply bulbs?

A. No, sir.

.

Q. You of course read this statement that you gave?

A. I guess so.

Q. This was given on February 16, 1958, the day of the accident, about what you did on February 10, 1958; isn't that true?

A. All right.

Q. You read this recently, didn't you?

A. Yes.

• • • • •

Q. Is there anything that you wrote anywhere with respect to your looking at the lights and saying they were all right or not all right between the 10th, when you renewed the two light sockets, and the 16th, when the accident happened? Is there anything anywhere?

A. I don't remember.

• • • • •

Mr. Klonsky: "S.S. United States, United States Lines Deck Department, Voyage No. 125W/B at sea, 16 February 1958. Statement of Antonio Rivas, Article No. 259, second electrician, concerning alleged accident of James V. Salem on February 16, 1958.

"On February 10, 1958 while the ship was between Southampton and Bremerhaven, Mr. D'Andrea, third engineer, sent me to see what was wrong with circuit number 15 feeding to the radar tower because he had a report from the chief quartermaster that the two bottom lights were burning out too often. This was in the afternoon. I went up there and checked the circuit and it was all right. The fuses were good. But I was suspicious of the lower two sockets, so I replaced them with new sockets and new [fol. 165] bulbs. When I left everything was in good order."

The Witness: Right.

• • • • •

McGhee—Cross

By Mr. Klonsky:

Q. Did you say you use aluminum paint to paint the platforms?

A. Yes, sir. The whole thing is painted aluminum, to the best of my knowledge, yes, sir.

Q. Did you ever hear of skidproof paint?

A. I don't think so, no, sir.

.

Q. You don't know what skidproof paint is?

A. Yes, I know what skidproof paint is.

Q. What is skidproof paint?

A. It is a paint with an abrasive in it.

Q. With an abrasive in it?

A. Yes.

Q. That's to help the footing of whoever walks on a slippery surface?

A. Yes.

Q. When the ship was in drydock in December of 1957, was the paint that was put on paint with an abrasive in it?

A. Not that I remember. I don't remember that, no.

Q. That is your best recollection, right?

A. That's right. The entire radar tower is painted with aluminum paint, to the best of my recollection.

.

Q. In the period of over a year before February 16, 1958, when Mr. Salem was on the ship, were you the ship's boatswain, too?

A. Yes, sir.

Q. Did you have any complaints about his work, about his relationship with the crew, prior to February 16, 1958?

A. Not to my knowledge.

Q. As far as you know, he did his work in a satisfactory manner and got along with the men?

A. As far as I can say, yes.

.

[fol. 166]

Boyer—Cross

Q. You say he asked you to send a radiogram?

A. That's correct.

Q. To whom?

A. To his wife.

.

Richards--Cross

By Mr. Klonsky:

Q. Mr. Richards, it is clear, is it not, that when you opened the door because you heard some noise no light in any of the five outlets were on?

A. I didn't see any light. There was complete darkness.

Q. Complete darkness?

A. Yes.

Q. You couldn't see Mr. Salem. You could only be guided by his voice?

A. That's correct.

Q. Earlier, when you came on to relieve Mr. Salem at 2 o'clock, what lights did you see on then?

A. When I stepped in, I didn't see no lights, except the reflection of it.

Q. I am talking about 2 o'clock in the morning, when you first came in.

A. Two o'clock in the morning?

Q. What lights were on in the tower?

A. When I come up, I see one light.

Q. Which light?

A. By the crow's nest, when you step on the platform.

Q. That platform was lit by that light when you came on?

A. Yes.

Q. Did you call the bridge to tell them about the lights being off?

A. No.

Q. The two upper lights, number four and five above the crow's nest, had they ever been on?

A. I don't remember, except after the ship yards, or something like that, when they leave the ship yards, they have those lights.

Q. When you say you don't remember, what do you mean?

A. I didn't see them. There were no lights.

Q. No lights up there?

A. No lights lit.

Q. How long before the accident were those two outlets up there without lights?

A. I don't remember any lights.

[fol. 167] Q. For the whole time you were there?

A. Like I said, after the ship left the shipyard, I see them all lit up.

Q. For how long?

A. I don't know, because I don't continuously go as a lookout AB.

Q. Let's take the voyage that the accident happened and the voyage before the accident happened, two voyages.

A. All right.

Q. Those two upper lights, were they on during those two voyages or off?

A. I don't remember above. I don't remember seeing them.

Q. You mean they were off; is that your best recollection?

A. Yes.

Q. If those lights were on, would they reflect down on this platform?

A. Yes.

Q. The platform itself on which the accident happened, what was its condition on the day of the accident?

A. What are you referring to by condition?

Q. Were there any risings, any perforations, any diamonds to catch your foot to protect it from slipping?

A. It is a steel plate. There are no perforations. It is smooth.

Q. Was there any skidproof paint or anything like that on it?

A. No.

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Q. Did you ever hear of sweat on metal caused by a variation of temperature outside and inside?

A. Yes.

Q. Answer this very carefully. Did you ever hear Mr. Salem knock on the door before his accident?

A. No.

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Q. Did you ever have a flashlight issued to you as an able bodied seaman?

A. No.

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Q. What happened when you pulled on his leg?

A. I believe he said, "My back, my back."

Q. Did he say that or did he leave out a sound of any kind?

A. He just was hollering, "My back."

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[fol. 168] Q. You say you asked him the first time, "Are you all right, can I make the call?" and he didn't answer you?

A. Yes.

Q. Then you asked him again?

A. Because he complained, "My back." He said, "My back." Then I wanted him moved. I asked him if I can move him closer, to save him, you know inside the platform.

Q. Mr. Richards, how many times did you ask him whether you could leave?

A. I don't recollect how many times. Only a few times. Three times, or something like that.

Q. While you asked him, did he keep on complaining about his pain?

A. First from the beginning, yes. Then he said, "All right."

Q. And you put his right arm around this enclosure and you left him there?

A. That's right.

Q. Is that right?

A. That's right.

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Q. Isn't it true that this telephone is just about a foot to the left of the doorway opening and that you can reach around, turn the ratchet, pick up the phone and get the bridge, because you had a direct line to the bridge?

A. I don't know. If you are standing without anything to hold—not from that direction, where he was sitting. If you were standing inside, you might reach it.

Q. That is what I am saying. From the platform, without going into the crow's nest, you could make that call, can't you?

A. Only you have to stay close to the door.

.

Q. Was there a handhold, or a rail, or a lifeline there?

A. No.

Q. With respect to this statement, do you remember giving this statement: "The platform is made of smooth steel. It has no diamonds or points on its walking surface. The [fol. 169] platform is very smooth and partly worn away and I am very careful walking on it." Do you remember saying that?

A. I don't remember. Only you have my statement.

Q. Is your recollection better now or was it better in March of 1958, right after the accident?

A. I believe then I have a good recollection.

Q. Better than now, isn't that right?

A. Well, you have my statement.

• • • • •

Mr. Klonsky: "The crow's nest itself is very dark. Then I heard a noise. When I opened the door and before I heard a noise I don't remember saying anything to Salem. After the noise I heard Salem calling for help saying, 'Help me.' I asked him where he is. He continued calling for help and saying, 'I can't hold much longer.' I stepped over the coaming and tried to find where he is. I located one leg on the platform. I grabbed a firm hold on the one leg which was lying horizontally on the platform, with his toes in an upward direction. When I tried to pull him onto the platform he started to scream about the pain in his back. I lowered his leg, which I had lifted to pull. I think it was his right leg. I asked him to give me his hand and finally located his hand in the darkness. I then managed to raise Salem's body to the platform. I tried to move him near the door but Salem wouldn't let me move him because of his pain. When I had raised Salem's body to the platform I had put Salem in a sitting position. I told Salem I must have help and asked a few times if I could leave him to make a telephone call for help from the telephone in the crow's nest. I asked him if he could manage while I left him. He kept on complaining about his pain and finally agreed to let me go to make the call. Before I left I made [fol. 170] sure that his right arm encircled the cable line, which was about one foot from the edge of the platform. He was sitting aft of the cable line with body facing port-side and his legs laying over the edge of the platform, in open space."

I will read that again to you: "With his legs laying over the edge of the platform, in open space. I then went to make a telephone call."

So you did leave him sitting there on this ledge with his legs down?

A. As far as I recollect, only one leg.

Q. This doesn't refresh your recollection, then?

A. Well, no.

Q. But it has your signature on the bottom of this page?

A. Yes.

Q. On every page?

A. Yes.

Q. "I then went to make a telephone call. While I was on the telephone just being connected to the bridge, I heard Salem calling for help again. I dropped the phone and ran to help Salem. I couldn't feel him on the platform. I heard Salem screaming from below the platform and I yelled to him to hold on. I then went back to the phone and asked for emergency help with requests for lights. In a few minutes the junior third mate Gregware came with a flashlight. I saw Salem in the empty space between the vertical ladder and the second platform which is located about eight to ten feet below the crow's nest platform. I do not remember to what Salem was holding on. I was not able to go down the ladder to help him, since it was so dark, and I might step on his hand if he was holding on to the rungs of the ladder. The junior third mate climbed up the ladder with the flashlight, and now having some light I climbed down the ladder, and between both of us we managed to get him on the second platform. I stayed with Salem and the junior third mate climbed up to the crow's nest and phoned for more help. The next person there as I remember was Mr. Roberts, the ship's hospital attendant. I then left the second platform and climbed up and back into the crow's nest to continue my duty. The junior third mate had given me his flashlight and told me to give light to the second platform. Salem was finally brought down by flashlight. There were about a half dozen flashlights being used. There were no cluster lights or any electrical lights. I make this statement of my own free will," signed "Francis Richards."

Gregware—Direct

Q. What was your capacity in February, 1958?

A. Third officer, S.S. United States.

Q. When you entered the area did you shine the flashlight up above?

A. Yes. I entered into the crow's nest. I shined the flashlight up into the crow's nest.

Q. Was there any light in the crow's nest?

A. No, there was not.

Q. When you shone the flashlight up above, what did you see?

A. I saw Salem up there, hanging up there. I hesitated for a minute whether to proceed up, just in case he did fall. If I started up, he would have landed on me. That would have been the end there, too. I waited for Mr. Richards, there, the AB, to make sure he had a good hold on Richards, and he said he did, and I proceeded up the ladder.

"At approximately 0235 hours on the 16th of February, 1958 while standing at regular watch we received a call from the lookout, which I answered. Lookout Richards, Article 41, yelled, 'Emergency, Salem, come quick.' I first reported to Mr. Thum, second officer, and then proceeded to the [fol. 172] radar tower. Upon entering I found there weren't any lights. I shined my flashlight up through the trunkway where I located Richards and Salem on the lookout platform. I immediately proceeded up the ladder finding Salem with one leg in between the ladder rung with Richards holding on to him. Between Richards and myself we raised him to the platform, finding Salem in a state of shock."

Is that what you said?

A. Yes.

Q. What did you observe about Mr. Salem that prompts you to say he was in a state of shock?

A. Well, he was just like delirious there. He was mainly all excited, upset.

Q. But it was more than that, wasn't it? It was more than just being upset.

A. All I can say is he was upset, all worked up.

Q. He was in a state of shock, wasn't he?

A. That's what I figured.

Q. "Salem kept complaining about his back and the slightest touch seemed painful." Right?

A. Yes.

Salem—Redirect

Q. What did they do for you in the hospital?

A. I remember the first time I got up I was dizzy for a while. I reported I am dizzy. Then he give me a shot. Then I believe I feel a little bit better. So I find myself—my both legs is tied up and there is some weight on my leg. The both arm is tied up, too. He put some kind of bottle with fluid.

Q. Fluid from a bottle?

A. Yes, in the arm.

Q. How did you feel while you were on that ship coming back to New York?

A. ~~I will~~ I tell you, I have a hard time, especially every time the ship hit the rough sea. My back was hurting me more and I complain too much. Every time I complain about my back, they give me a shot until I get dopey for the two days.

[fol. 173] Q. Do you remember how your right leg felt while you were in the ship's hospital?

A. Yes. Especially in the right leg, I felt kind of numby.

Q. What?

A. Numby.

Q. Numb?

A. Numb, yes. I could not move my toe.

Q. When you got to New York, they took you off the ship, didn't they?

A. Yes.

Q. They put you on a stretcher?

A. Yes, I was on a stretcher.

Q. When they put you in the stretcher, did you have weights on your legs then, too?

A. No. They take the weight off, but I still on the stretcher. The right knee was built in the stretcher. I was in the stretcher. They tie me up.

Q. They tied you up?

A. Yes.

Q. Did they stretch your legs out, do you remember?

A. No. It's the same stretcher that was in the bed.

Q. Did they take you by a hospital ambulance to the hospital?

A. Yes.

Q. How long did you remain in bed in the hospital before you were able to get out of bed to do any walking?

A. I didn't get up until about a month and a half. Even the first time I tried to get up, every time I tried to get up I get dizzy and I fall down. But anyhow, I was in the bed. I can't get up a month and a half, maybe more.

Q. When you were in this bed, did they have these weights on your legs, too?

A. Yes, I got weights on my leg.

Mr. Klonsky: With the Court's permission, may I indicate the various periods of hospitalization, in-patient and out-patient, pursuant to these records?

[fol. 174] Mr. Connor: I have no objection.

Mr. Klonsky: First period of in-patient treatment from February 18, 1958 to May 2, 1958, a little less than three months.

The second period of in-patient treatment from July 10, 1958 to July 14, 1958.

The third period, September 9, 1958 to November 6, 1958.

The next, September 14, 1959 to September 16, 1960.

His latest out-patient treatment is still not fit for duty on an orthopedic basis, October 14, 1960.

With the Court's permission, may I read various out-patient records?

The Court: Yes.

Mr. Klonsky: He was out-patient from July 8, 1958, declared not fit for duty for his back. He was also out-patient July 10, 1958, not fit for duty re his back and was

to be re-hospitalized, and he became re-hospitalized on July 10, 1958 to July 14, 1958, not fit for duty.

Then July 20 or 28, 1958 not fit for duty, and it said for three months on a neuropsychiatry basis.

July 29, 1958, not fit for duty; August 12, 1958, not fit for duty; July 26, 1958, not fit for duty, re back; November 5, 1958, not fit for duty for one year; referred to orthopedics on September 9, 1958; November 17, 1958, not fit for duty, re back.

December 15, 1958, fit for duty, re back; not fit for duty neuropsychiatrically, until seen on 12/22/58.

Then 12/22/58, not fit for duty psychiatrically; 2/10/59, not fit for duty re back for an indefinite time. 2/20/59, not fit for duty re back, to return April 20, 1959. July 22, 1959, [fol. 175] not fit for duty re back, to return August 12, 1959.

There is also a notation here on May 13, 1959, not fit for duty, to return on June 1, 1959.

August 12, 1959, they said fit for duty re back, not fit for duty psychiatrically, to return August 24, 1959. Then August 24, 1959, fit for duty psychiatrically.

Then he became an in-patient from 9/2/59 to 9/4/59, not fit for duty for two weeks. Then they said he would be fit for duty. Then 9/17/59 not fit for duty re back, general surgery, returned 11/27/59. 11/27/59 not fit for duty, to return on 12/11/59. On 12/11/59 they said not fit for duty re back, to return on 1/29/60, and on 1/29/60 not fit for duty re back.

2/24/60 fit for duty re back.

4/1/60 not fit for duty re back.

4/7/60 fit for duty re anatomical area.

May 13, 1960, not fit for duty re back, to return 6/1.

6/1/60 not fit for duty neuropsychiatrically.

6/6/60 not fit for duty, probably re back. We can't make out that word. To return 6/24/60.

On 6/9/60 returned not fit for duty psychiatrically, to return 6/24/60.

6/24/60 not fit for duty neuropsychiatrically, to return 7/25/60.

Then on 6/24/60 they also said not fit for duty re back, either. Both back and neuropsychiatrically on that day.

July 22, 1960 not fit for duty re back.

August 19, 1960, not fit for duty re back.

September 16, 1960, not fit for duty re back.

9/27/60, not fit for duty re back.

[fol. 176] October 14, 1960 not fit for duty orthopedically; fit for duty psychiatrically; to return November 16, 1960.

November 16, 1960, similar complaints; patient cancelled first appointment to rehabilitation center, firmly encouraged to keep next appointment; fit for duty neuropsychiatrically, not fit for duty orthopedically, to return on December 16th.

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Graubard—Direct

A. I was graduated from New York University and Bellevue Hospital Medical College in 1932; licensed to practice medicine and surgery in the State of New York on June 30, 1932. I interned for the year 1932 to 1933 at the Beth Israel Hospital in New York, and from 1933 to 1934 at Cumberland Hospital, in Brooklyn. From 1934 to 1937 I was in the Army as assistant chief of the surgical service at Governor's Island. From 1937 to 1941 I was in private practice, and during that time I was assistant visiting surgeon at the Broad Street Hospital, at the Cumberland Hospital, and the Reconstruction Hospital Unit at the New York Post-Graduate Hospital where I taught traumatic surgery.

From 1941 to 1946 I was in the Army, and I ended up as a colonel in the Medical Corps and as commanding officer of the station hospital at Camp Shanks, New York.

From 1946 to the present time I have been in private practice. From 1948 to 1953 I was assistant visiting orthopedic surgeon at Kingston Avenue Hospital, and at the present time I am associate visiting traumatic and orthopedic surgeon at Cumberland Hospital; adjunct attending surgeon at the Grand Central Hospital; I am a certified Fellow of the International College of Surgeons and a Diplomate of the International Board of Surgery.

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[fol. 177] Q. Do you have your reports with you?

A. Yes, sir. For the first time I examined him on or about June 11, 1958, and for the second time on or about October 20, 1960.

A. Toward the right. I found that his gait was slow, protective, and that he hesitated in turning about. All of his activity was protective. His posture was good. The musculature was average, but the chest expansion was limited, especially on the right side. There was no pelvic list and no pelvic tilt, and the lumbolordosis, or the normal curve that we have in the lower portion of the spine as it goes towards the buttocks, instead of having a normal curve, it was flattened. With respect to movement of the trunk of his back, the motions on-standing were difficult and were markedly restricted.

In forward bending he could bend over so that the fingertips were able to reach only to nine inches from the floor. He could not bend backwards because of pain. I found that there was a restriction of what we call lateral bend, or bending to the side, on either side, restricted of about 20 percent of normal on both sides.

I measured both legs, and that was from the umbilicus, or from the belly button, down to the inner side of the ankle, and on the right it was 37 inches and on the left 37½ inches. The movements of the legs and hips were restricted more on the right side than on the left. The feet were normal. The circulation was normal. The reflexes were normal. The circumference of the right thigh was 15½ inches as compared to 16 on the left, and both calves measured 13 inches.

When I did what was called jugular compression, or pressure over the jugular vein in the neck, it produced complaints of pain in the back and in the frontal region of the skull. I also noted that there was tenderness over the junction between what we call the fifth lumbar vertebra—[fol. 178] that's low down in the back—and the first sacral, and that there was spasm of the muscles bilaterally, and I found that straight leg raising was positive bilaterally.

When I re-examined him on October 20, 1960, there was no essential change whatsoever.

Q. Go on, Doctor. What about the measurement of the thigh?

A. With respect to the right thigh measuring $15\frac{1}{2}$ inches as compared to 16, that is significant.

Q. Why?

A. Because that shows that there is an atrophy, or a loss of muscular consistency that will produce that particular difference.

Q. What is the relationship between the nerve emanating from the lumbar area and running down the thigh and the atrophy in that thigh?

A. The atrophy is the direct result of the involvement of the nerves on the right side, the right sciatic plexus.

Q. Where does the sciatic nerve emanate from?

A. It comes from various groups of lumbar and sacral vertebrae to join together and to meet and then to redistribute themselves.

Q. So atrophy would be a sign of nerve damage, would it?

A. That is correct.

Q. "Urine clear, no sensation of urinating, 500 cc clear." Do you see that?

A. Yes.

Q. In cases of severe spinal injury, is there a relationship between urinary involvement and the injury itself?

Mr. Connor: I object to that question, it is leading and suggestive.

Q. What relationship, if any, is there between urinary difficulty and spinal injury?

A. There is a great relationship between injuries to the [fol. 179] spinal cord, especially in the lumbar area, and urinary disturbances. It is very frequent and very common.

Q. What is the significance of "No sense of feeling in the right leg" and moving the toe slightly on that right foot?

A. It means there was a paralysis of the nerves going to the right leg which involved the sensory and the motor components, and by the sensory we mean the ability to feel,

and as far as the motor movements are concerned, the ability to move the leg or the muscles in that area.

Q. What is the significance of the fact that he could only move his right great toe slightly with respect to low back injury?

A. It shows that there was some interruption of the nerves arising from the low back region down to the big toe, namely, the sciatic nerve being involved.

Q. "0045 on February 17th, demerol, 100 mgs. for pain; taking broth well; pulse irregular; skips occasional beat." Does that have significance with respect to a head injury?

A. Yes.

Q. "Voiding well; two p.m., sleeping; screaming with pain; Dr. Fenger notified. Support put under back; five-pound weights on each leg removed." That meant they left him with ten pounds on each leg; is that correct?

A. That's correct.

Q. "For pain. Sips H₂O and complains of discomfort in intrapubic region, wants to void. Eleven a.m. voided 180 cc clear urine. Patient screaming with pain caused by ship's rolling."

A. Pitching.

[fol. 180] Let's look on page 91 of the hospital notes, Mr. Connor: at 2:30 p.m. on March 1, 1958, patient lost consciousness for about one minute and frothing at mouth observed by ward attendants.

Mr. Connor: That's "with."

Mr. Klonsky: "With frothing at mouth."

Mr. Connor: Yes.

They have here as a discharge diagnosis at that time chronic schizophrenic reaction, undifferentiated type, conversion reaction, spondylolysis L-5, with first degree spondylolisthesis.

On page 9 of this record there is noted by a Dr. Friedman that he had spondylolisthesis; myofascial disease, probably from guarding and disuse, probably associated with neuropsychiatric condition of anxiety reaction; believes symptoms are mainly supratentorial.

.

A. That is a defect of the spine itself.

Q. If a person has a congenital back without any symptoms whatsoever and then there is great pain and these readings of spondylolysis and spondylolisthesis, do you have an opinion whether a back that is asymptomatic, that is, without symptoms, for 37 years of his lifetime, would be more prone to severe injury with trauma than a person who would have an injury with a normal back?

A. Yes.

Q. Do you have an opinion?

A. Yes.

Q. What is it?

A. It definitely would be more prone to trauma.

.

A. Based upon everything, this individual sustained an injury to his head with evidence of a concussion and a [fol. 181] post-concussion syndrome, and he also sustained an injury to his low back region in the form of a herniated vertebral disc superimposed upon a congenital defect known as spondylolisthesis.

Q. What is the significance of these conditions with respect to his ability to work as a seaman?

A. I will speak only of the orthopedic or the back condition.

Q. Please do that.

A. For work as that of a seaman, as an able bodied seaman, I would say he is not capable physically of doing that type of work.

.

Q. With respect to your findings, the duration of the symptoms, and my hypothetical question, do you have an opinion as to the permanency of Mr. Salem's condition and inability to do the work of a seaman?

A. Yes.

Q. What is your opinion?

A. With respect to the back condition alone, I don't think that he will be capable of returning to work as a seaman at all.

Q. Ever?

A. Ever.

Q. You state that with a reasonable degree of medical certainty?

A. Yes.

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Graubard—Cross

Q. "And really impossible to adequately evaluate state of back with tremendous overlay." What does that mean, doctor?

A. There is some psychiatric or neurotic overlay that was on top of this whole back condition.

Q. This had to do with the neuropsychiatrics "Incidentally, patient tells me today that everybody laughs at him, strangers on street, et cetera; also that he gets headaches if he sits too long and back ache if he stands, and has great trouble sleeping; his disposition, NFD," which we agree means not fit for duty; "to return one week 7/2." It is signed by a name which I cannot read. Does that entry change your conclusions in any respect?

A. No, sir.

.

[fol. 182]

Graubard—Redirect

A. It varies with the individual. Some can start at 25 and some will start at 55.

Q. Doctor, I did not read to you what the surgeon of the ship's hospital had to say about this man's condition, and it is in Plaintiff's Exhibit 5. He said: "Full extent of injuries not yet determined; probable fracture or dislocation of vertebrae with spinal nerve injury; paralysis and anesthesia, right leg; concussion of the brain." He gave him sedation and bilateral traction on both legs. In one of the recent findings which I had referred to you before, in spite of all this interim period, in September of 1959, it went on to say: weakness, right leg, probably due

to nerve irritation L-5. When he first came to the Marine Hospital, they said he was too confused to relate the height of his fall. They talk of a short period of concussion with amnesia, which subsided after 12 hours. They have him mildly confused; abrasion of the head.

On page 10, volume 1: back flat L curve.

A. Flat lumbar curve, lordotic curve.

Q. Caused by spasm; right?

Mr. Connor: Are you reading?

Mr. Klonsky: Yes. I won't comment.

Q. Flat L curve; unable to move S/P.

A. "Without".

Q. Without severe pain; tenderness in L-5 area generalized. Abrasion in LS area—lumbosacral. There was a bruise there.

A. Yes.

Q. Moved each part of extremity but very slowly; straight leg raising only to 30 degrees bilaterally because of back pain. Then there is mild external rotation of right leg; neuro good superficial sensory reflexes but generalized hyperesthesia. Does hyperesthesia mean lack of sensation?

A. Lowered sensation.

[fol. 183] Q. The impression was cerebral concussion; fracture right transverse process at L-4; acute back strain and multiple abrasions.

Q. Doctor, here on page 24 of volume 1 there are X-rays taken of the pelvis, and they say here, "Reflex ileus due to back trauma." What is a reflex ileus, i-l-e-u-s, due to back trauma?

A. That means a paralysis of the small intestine due to the fact that the nerves that go to supply the muscles of the small intestine have been paralyzed as a result of the trauma and they are not functioning.

Q. Is that in the same area of the lumbar spine, too, the same general area?

A. That is correct.

Kaplan—Direct

At the present time I am director of the neurological services for the Hospital of Joint Diseases in New York; assistant visiting neurologist at Mount Sinai Hospital, and associate visiting neuropsychiatrist at Bellevue Hospital.

I have also been consultant in neurology to the United States Public Health Service on Staten Island and to the Veterans Administration Hospital in the Bronx.

I teach at both New York University College of Medicine and Cornell University Medical School. At New York University my rank is assistant clinical professor of neurology and at Cornell it is clinical instructor and lecturer in neurology. I am a diplomate of the American Board of Psychiatry and Neurology and I have been an assistant examiner for the Board since 1949. I belong to the usual societies in this specialty. There are about 14 or 15 neurological and psychiatric societies.

.

A. You mean can patients have a severe psychiatric reaction which disables them more than some physical injuries? Yes.

[fol. 184] Q. Yes. Did you at the request of the attorneys of Mr. Salem have occasion to examine him?

A. Yes, I did.

Q. When for the first time?

A. I examined this patient for the first time on July 7, 1958.

Q. When for the second time?

A. The second time, more recently, on October 18th, this year, 1960.

Q. Did you also have occasion during the first examination to see hospital records that were then existent and available?

A. Yes, I did. At the first examination I reviewed a photostatic copy of the Marine Hospital record for the February to May admission in 1958. I did not see any other hospital records at that time.

Q. Did you at the time of your first examination have available to you the medical log of the S.S. United States pertaining to Mr. Salem?

A. No, I did not.

Q. Did you then have the conclusions of the ship's surgeon, a Dr. Fenger?

A. No, I did not.

Q. Did you have that opportunity during your second examination?

A. Yes.

He described this very specifically when I asked him to try to pinpoint exactly where the pain was, and he said that this pain began in the low back and then it extended to the right buttock, and from the buttock down the posterior or back of the thigh on the right, and then into the posterior lateral or the back and side, outside of the right leg, ending at times at the right ankle, outside of the right ankle.

Q. Does that approximate any nerve course?

A. Yes.

Q. Which nerve does that approximate?

A. This type of pain radiation is rather typical for the 5th lumbar nerve root; that is, irritation, any kind of irritation of a nerve root, or any tumor growing on a nerve root, would produce pain, specifically in the radiation distribution.

[fol. 185] He also had what I described as bilaterally positive Lasague signs. The Lasague sign is a test of nerve root irritation—

Q. Yes. Give us your opinion.

A. At the time that I saw him for the first time, on the basis of the information that I had and the hospital record and his history and my findings, I concluded that the patient had nerve root irritation at the fifth lumbar and first sacral nerve root level, probably due to a herniation of a disc, that is, an intervertebral disc, which is a cartilage between the vertebral bodies in the spine, related to the injury which he had in February. I noted that the type of pain he had was specific for nerve root irritation, but

that because of hysterical findings on examination which masked some other possible findings in the right lower extremity, that he also had a conversion hysteria, or a hysterical reaction.

Exiting from the spinal canal, when it is swollen, the canal presses on it. As the swelling subsides, with bed rest, the nerve becomes smaller, normal size, and may not be encroached upon by the disc herniation. So that the patient may have a remission because his nerve is better, not because his disc is better. We know that because following the improvement in patients who have disc herniation, we do myelograms a year or two later, when they are perfectly well, on an experimental basis, and find that the protrusion is in the same place. So that what has happened is that they have gotten better because their nerve has not been irritated as much.

Q. But they are susceptible to further exacerbation?

A. Oh, yes, all the time.

Q. Doctor, you have had occasion, of course, to look at Dr. Fenger's findings when he was in the ship's hospital.

A. Recently, yes.

[fol. 186] Q. There is a finding of probable fracture or dislocation of vertebra with spinal nerve injury, paralysis and anesthesia, right leg, and there is mention in the medical log of only being slightly able to lift the toes of his right leg, though the left leg was normal. Are these significant with respect to diagnosis of herniated disc?

A. Yes; not only to herniated disc. It is indicative of more severe trauma to the spinal cord or to the termination of the spinal cord, the so-called conus, or cauda equina, which is the end of the spinal cord. There were some other findings. I don't recall whether it is in this report or the ship's log. It indicates the severity of the initial injury, which I was not aware of in detail at the time I first saw him.

Q. Doctor, are you aware of the fact that they X-rayed this man and found a reflex ileus due to back trauma?

A. Yes. That is one of the other things I want. I want to mention that. He apparently had a paralytic ileus. That is simply a distension of the small bowel because of interference with the nerve centers controlling bowel function.

As a result of this the patient becomes distended. This distension is due to nerve involvement. It is not due to abdominal injury directly. It is a reflex response to irritation of nerve roots which innervate or supply the small bowel.

Q. Is that consistent with a trauma that could be serious enough also to cause a herniated disc at the L-5 level?

A. Yes. The paralytic ileus itself is caused by a more diffuse injury to the entire lower portion of the spinal cord. I wouldn't say that an L-5 nerve root irritation would cause a paralytic ileus. That is too low down. There must have been initially a wider area of injury, including the lower portion of the spinal cord.

Q. When he described the radiation of his pain to you down the right lower extremity and the course that it took, was that the classic course of the sciatic nerve?

[fol. 187] A. It is not the classic course of the sciatic nerve. It is the classical course of the fifth lumbar nerve root. The sciatic is made up of five nerve roots. The fifth lumbar is only one of them. It is the course of radiation of pain within that nerve root.

Q. Doctor, are you able to give us fully an opinion with respect to this man's personality traits and the effect of trauma upon him without knowing something about his family life?

A. Without knowing something about it?

Q. Yes, with respect to his immediate family. Would that be important to you?

A. The only thing I would say is that on the basis of my examinations of this patient he exhibits emotional disturbances now which apparently he did not exhibit before, according to the history I have. In the first place, he never had such disability with his lower extremities before this injury, and part of his disability in his lower extremity is from his emotional reaction, in addition to the fact that he had apparently a significant back injury with involvement of the spinal cord and spinal nerve roots.

Q. My question to you is, in order to properly evaluate and tell us about this man's present mental condition and how the trauma, if any, was involved, you would find it

important for you to know something about his personal family life.

A. Oh, yes.

Mr. Klonsky: Your Honor, we discussed that, as you will recall, the other night. I don't want to do anything or say anything that is improper. It would have to do with his own immediate family. That is the only part I have reference to.

The Court: I think we better abide by what we agreed the other evening and stay away from certain aspects of it.

Q. What was that psychiatric diagnosis?

A. The psychiatric diagnosis was chronic schizophrenic reaction, undifferentiated type.

[fol. 188] Q. Doctor, is schizophrenia beyond the field of of neurosis and into the filed of psychosis?

A. Schizophrenia is a psychotic illness. It is not a neurotic illness.

Q. Do you have an opinion as to whether this man had a post-traumatic neurosis?

A. It is my feeling that this man has had a severe post-traumatic neurotic reaction which apparently bordered on or actually was psychotic at one time when he was in the hospital.

It was my conclusion at the time that I saw him on the second time that he exhibited a severe conversion hysterical reaction, which I noted to be undoubtedly part of a schizophrenic reaction, because of his behavior in the hospital and the hospital information about him, and that this was apparently precipitated by the accident in February of 1958. I noted also that he still had complaints and findings indicating that there was persistent nerve root irritation

Q. Based upon the intensity of this and its duration to the present day, do you have an opinion as to its permanency?

A. I think I would answer that essentially the same way, that at this time, because of the long duration of this difficulty, the likelihood of his improving seems remote to me. It may be that this patient will get worse and require more specific orthopedic therapy or neurosurgical therapy. That I can't anticipate at this time.

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Cross examination.

By Mr. Connor:

Q. Dr. Kaplan, I think you said in answer to the second hypothetical question that you doubt that Mr. Salem will go back to sea. Do I correctly quote you?

A. Yes, I think so.

[fol. 189] Q. Can you make that statement with reasonable medical certainty?

A. On the basis of his condition when I last saw him, yes.

Q. The condition noted in the surgeon's journal with respect to treatment and not feeling anything on urination, did you notice that that appeared on only one occasion?

A. I have reference to it on only one occasion. I don't know whether it appeared more than once.

Q. That isn't necessarily a permanent condition, is it?

A. He doesn't complain of loss of feeling of urination now. This was an initial thing, indicating the severity of the initial injury.

.

Q. You did conclude, however, that Mr. Salem was the type of person prior to this accident who might be upset and suffer hysteria?

A. I mentioned that he was undoubtedly the kind of person who was predisposed for an emotional reaction like this if the proper stress occurred. All of us are predisposed to emotional reactions based upon our background. There is no such thing as normality in terms of no one having any conflicts which would not expose them to anxiety or to some kind of emotional reaction with a given kind of stress.

.

Q. Would a concern about a lawsuit produce this type of reaction, doctor?

A. I would say that concern about anything might produce anxiety. The kind of reaction that this patient has had from the moment of his injury up to the present time is certainly not what occurs to me as to be something in response to his lawsuit, but something in response to his injury.

• • • • •

[fol. 190]

Redirect examination.

By Mr. Klonsky:

Q. Dr. Kaplan, would sodium luminal, demerol, and other narcotics and analgesics in large quantities, either given by injection or orally, be considered placebos?

A. No. Of course not.

Q. There was reference, doctor, to something in the hospital record about the Lasague test performed. I come to you with Plaintiff's Exhibit 15, page 9. Here we have Lasague's. Do you see that?

A. Yes.

Q. You will notice there are three vertical lines, one horizontal line for both sides, with question marks after each one.

A. Yes.

Q. Does that have any significance as to whether they are positive or negative?

A. Yes. These are positive Lasague tests. I assume the question mark has to do with whether it is three plus or two plus or four plus. It is made three plus, but it certainly indicates a positive test. If there were a question as to its being positive, I don't think they would put three plusses there. I think it has to do with the degree of its positiveness that the question mark is noted. That is my own interpretation, however.

• • • • •

Mr. Klonsky: Your Honor, it is pertinent, I believe, at this time to inquire, before I go further on my direct ex-

amination, as to whether the fourth cause of action for maintenance and cure is to be taken by the Court. If so, the evidence related to that could be deferred.

The Court: Whatever you folks wish. I understand it is the practice here.

Mr. Klonsky: I understand it is, too.

Mr. Connor: Some Judges do it, yes. I think more recently most of the Judges have been doing it.

The Court: I will do it, then.

[fol. 191]

Salem—Redirect

Q. Were you wearing a brace around your body when you first left the Marine Hospital?

A. Yes. I had three different braces, not one.

Q. Are you wearing a brace now?

A. Yes. All over my back. From here to all over (indicating). That's all my back. But I still had it bad, even with the brace.

Q. Have you always worn the brace since you left the Marine Hospital the first time?

A. Yes.

Q. Did you ever wear a brace before the accident?

A. No, never.

Q. Were these braces given to you by the doctor over at the Public Health Service?

A. In the Marine Hospital.

Q. On November 5, 1958 they said you were not fit for duty for one year. Do you remember that?

A. Yes.

Mr. Klonsky: \$5,656.76.

Q. This pay, it includes base wages and overtime, doesn't it?

A. Yes.

Mr. Klonsky: Do you mind if I lead here a little bit about overtime?

Mr. Connor: No.

The Witness: That's plus my vacation.

Q. Overtime includes Saturdays and Sundays while you were at sea?

A. That's all together.

• • • • •

Q. Mr. Salem, are you still going for treatment to the Marine Hospital?

A. Well, I tell you. I supposed to. But the doctor, he do a favor to me, because in the wintertime it was very hard for me to travel between New Jersey and New York. So I told the doctor, "Please, if there is any way"—

[fol. 192] Mr. Connor: I object.

The Court: Don't get into a conversation with the doctor, Mr. Salem. Just tell us now what you did.

The Witness: All right.

Mr. Connor: I submit, your Honor, that that question can be answered yes or no: is he or is he not still going to the hospital.

Q. Are you still going as an out-patient to the hospital?

A. No.

Q. Aren't you supposed to return on December 16, 1960 for another examination?

A. Yes.

Q. Then you are still going out patient, aren't you?

A. Yes.

Q. Tell me this, Mr. Salem. How do you feel now?

A. Right now?

Q. Yes.

A. I feel general pain, but it is not too much. When I sit too much, yes, I get more pain.

Q. Pain?

A. Yes.

Q. Where do you have pain?

A. In my back, and especially when I sit down on a soft couch, like I try to enjoy, that is out of order. I could sit down.

Q. You could or could not sit down?

A. I sit down, but I move too much, and I get more pain

if I sit down on something soft. So I always like to sit down on something hard.

Q. What about sleeping?

A. In sleeping, well, I get a piece of board underneath my mattress. It helps me, yes. But still the time I move around I feel more worser.

Q. Do you take any medicines?

A. Yes. I get every time I go in the hospital.

• • • • •

Salem—Cross

Q. You have a cane with you today, have you?

A. That's right.

[fol. 193] *Tribble Deposition—Direct*

Q. Do you find it necessary to carry that cane from the back of the courtroom to the front?

A. No, not necessary, but when I do sit down too much, I get a cramp.

• • • • •

Mr. Connor: No. Just selected parts.

I am reading from Page 127. This is actually from Page 28 of the plaintiff's deposition before trial.

"Question: Where did you keep the spare bulbs at that time?

"Answer: It was all gone.

"Question: Then there were no spare bulbs?

"Answer: No. The other lookout AB was bringing extra bulbs and we keep them there, but at that time it was no extra bulbs.

• • • • •

"Q. You have a license for Second Mate?

"A. Yes.

"Q. Have you been so certified by the United States Coast Guard for American ships as a Second Mate?

"A. Yes, sir.

"Q. And you have passed examination thereof?

"A. Yes, sir.

"Q. Was there, aboard the S. S. United States, in Feb-

ruary, 1958, a fellow seaman by the name of James Victor Salem?

"A. Yes, sir.

"Q. What was his job?

"A. Lookout AB.

"Q. Same as yours?

"A. Yes.

"Q. What were your hours of watch?

"A. 4-to8 watch.

"Q. What were his?

"A. 12-to4.

"Q. Who is the intermediate watch between eight and twelve?

"A. Trendell Terry."

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[fol. 194]

Hyslop

Cross examination.

By Mr. Klonsky:

Q. Dr. Hyslop, with respect to simulation, misrepresentation or fraud, may I ask you, sir, whether you had seen the ship's hospital record at all when you examined on behalf of the ship?

A. No. I didn't see that until this morning.

Q. The first time you saw it was this morning?

A. That's right.

Q. And these two reports you wrote up for the ship owner was without the benefit of the ship owner's own hospital record before you; isn't that true?

A. I didn't have it.

.

Q. I will read the sentence before as you requested: "It has certainly not been helpful to allow this claimant to continue to receive physiotherapy which is indicated only if there is a genuine physical need. Explaining such treatment at this date and after two extensive periods of hospital observation lets the physicians open to the charge of istrogenic responsibility."

A. That is what I said.

Q. By istrogenic responsibility, you mean they are not properly fulfilling their function as physicians?

A. That is correct.

Q. That is what the word means?

A. They are responsible for a man's state of mind as a result of what they are doing for him.

Q. And you contested what they were doing for him?

A. I contested the judgment which they were following.

Q. Doctor, are you familiar with the fact that as recent as June of 1960, this year, he was held not fit for duty on a neuropsychiatric basis?

A. I think I saw that.

[fol. 195] Q. And that substantially after your examinations and conclusions?

A. That's correct. I told you I don't know how genuinely disabled he is.

Q. I call your attention to the fact that in the United States Public Health Service record, today he is not fit for duty re back in the orthopedic clinic December 16; today he wears a brace ever since he left the hospital the first time; today he has complaints related to his back.

A. I will accept that as on the record. I haven't contested it.

Hyslop—Redirect

"September 16, 1960. No change in status of back, still painful; pain, right leg; walks with cane, etc.; do not believe that this patient will ever be fit for sea duty when back condition and NP situation considered together. He has spondylolisthesis that would be impossible candidate for any surgical treatment. Will have him seen by consultant for opinion as to eventual ability to return to duty. If cannot agree that he will not, then should be referred back to social service for rehabilitation," I guess it is, "with defi-

nite statement as to duty status. Impression as above. Disposition; appointment Dr. Michelli, NFD."

Mr. Klonsky: "Not fit for duty."

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Tribble Deposition—Direct

"Q. Now, for the seven months before February 16, 1958, while you were a lookout AB, tell us what you observed with respect to the condition and nature of these five lights within the radar tower?

"A. Well, almost every trip there is a light, two lights usually go out and we would report them out. And next day usually they were—it was rectified. Usually there were about three lights lit—I mean they were lit most of the time, the first three lights. The upper and top lights were very seldom ever lit.

• • • • •

[fol. 196] Mr. Klonsky: "A. I would say that it was the engineering department that was responsible for the lights. I mean the deck department are responsible for seeing that the engineering department put the lights there, keep them there.

"Q. Who specifically took care of that?

"A. Well, the electrician who was on duty in that particular area."

Page 28, Line 7:

"Q. When you left the tower about 8:00 p.m. on February 15, 1958, which is the evening before the accident, how many lights were lit inside the radar tower?

"A. Two.

• • • • •

"Q. Were there any perforations or raisings or diamonds on this platform?

"A. No.

"Q. Tell us what if anything had been painted on that platform for a period of seven months or so prior to this date, while you were lookout AB?

"A. Nothing."

• • • • •

Mr. Klonsky: "Was there any such paint on the platform on February 15, 1958 when you left at 8:00 p.m.?"

The Court: The objection is overruled.

Mr. Connor: Exception.

Mr. Klonsky: "A. No, sir."

Page 33.

"Q. Yes.

"A. There was no paint before the accident. There was no non-skid paint on the platform before."

Mr. Klonsky: "Q. Do you recall whether or not, when you were on duty the day before the accident, for the two watches, there was any moisture on any of the platforms?" [fol. 197] The Court: Objection overruled.

Mr. Connor: Exception.

Mr. Klonsky: "A. Well, it's constantly. Well, it's constantly you have moisture inside, on the sides of the platform, inside, due to different temperatures from outside and inside.

"Q. What do you call that?

"A. Condensation. Well, sweat."

Page 36, at the top of the page.

"Q. And while the vessel was at sea, particularly in a winter sea, what if anything did you observe with respect to the radar tower and any movements thereof?

"A. Well, quite a bit of vibration."

Terry Deposition—Direct

Mr. Klonsky: This is the deposition of Trendell Terry, who was the lookout AB for the 8-to-12 watch.

"Q. By whom are you presently employed?

"A. United States Lines.

"Q. Aboard which vessel?

"A. SS United States.

"Q. In what capacity?

"A. Lookout able seaman.

"Q. Were you so employed on February 16, 1958?

"A. Yes."

• • • • •
 "Q. What time did you leave?

"A. At midnight, twelve o'clock.

"Q. Who relieved you?

"A. Salem.

"Q. What did you observe about the condition of the lights when you left around midnight on the night of the accident?

"A. The only light that was on was the light at the crow's nest level, where we go into the crow's nest. The one at the bottom was off and the rest was all off. The only one that was on was that one.

• • • • •
 [fol. 198] "Q. Some of your answer, where you relate the condition of the lights, you have already given us. What, if anything, during the month before the accident, did you observe about the lights? What did you see about these lights?

"A. They went off frequently after replacing a fresh bulb, about from the time from New York to Bremerhaven, Germany, replacing the same bulb.

"Q. How many bulbs were being replaced for a month before?

"A. The two above the crow's nest area we didn't bother with. We didn't go up there. The only ones we were doing the replacement of was from the crow's nest down. Well, I wouldn't say exactly how many, but—

"Q. Your best estimate.

"A. Well, from New York alone, that trip, I think we replaced two or three bulbs, Salem and I both, and we got tired of doing it and figured that since nobody was seeing to it we reported it.

"Q. Did you report it?

"A. I reported it.

"Q. To whom?

"A. To the bridge."

• • • • •

"Q. Did you, yourself, do the reporting?

"A. Yes.

"Q. Was he the mate in charge of the watch?

"A. Yes.

"Q. What, if anything, happened after you reported it to the bridge?

"A. They still kept going out without being fixed."

• • • • •
 "Q. Would you describe him," meaning the plaintiff, "as a nervous man?

"A. No. He seemed very relaxed all the time."

Page 75:!

"Q. The telephone in the crow's nest is actually within the crow's nest, isn't it?

"A. Yes.

"Q. In order to use it it is necessary to go into the crow's nest itself, isn't it?

"A. You can reach in."

• • • • •
 [fol. 199] "Q. Did you also say, 'To the best of my recollection the walking surface of the crow's nest platform had not been painted for eight months. It's last painting had only been with aluminum paint. This surface was very smooth and slippery and if shoes were wet it was very dangerous. I feel that the surface should have been painted with rubberized anti-skid paint and that a non-skid covering should have been placed over the surface. There certainly should have been a railing or lifelines on this platform to grab,'—"

• • • • •
 Page 95, line 9. This is Mr. Connor's cross.

"Q. Is the telephone inside the crow's nest above or below the level of the top of the doorway?

"A. It's about even. It starts even with the door.

"Q. Can you reach straight in and get the telephone or do you have to put your hand up to get at it?

"A. You can reach right around to pick it up.

• • • • •

Coady—Voir Dire

Q. You speak of film-taking in February of '59; March, '59; October, '59; November, 1960.

A. Yes, sir.

Q. Those were specific days you took fifty feet on each showing?

A. No. On the first day it was fifty feet. Then March 26, 1959 it was 100 feet. On October 19, 1959, it was 100 feet.

Q. And November 18th?

A. It was just 20 feet.

Q. Was he under observation on any other days than these?

A. Yes, sir.

Q. But you didn't take photographs on these other days?

A. No, sir; not every time.

Q. How many other days were there that you didn't take pictures?

A. I saw him 14 times.

Q. All together?

A. Yes; from the beginning to just last week. There were ten times when I didn't take films.

[fol. 200] Q. In any of these films did he have his cane?

A. Yes, the last one, just recently.

Q. On the ten times you didn't take pictures, did you notice whether or not he had a cane?

A. Yes, he did, the last three times we followed him, in November of this year.

Q. When you saw him on January 19, 1960, you observed the way he walked, didn't you?

A. Yes, sir.

Q. He walked more slowly than any other time, didn't he?

A. He had the baby in his arms. That may have given me the idea.

Q. Do you say in your report that he had a baby in his arms when he walked slowly?

A. No, sir. I don't think I did put it in there.

Q. I think you mentioned that he walked more slowly than he ever walked before?

A. Yes. He seemed to have a hang-dogged look about him.

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 Redirect examination.

By Mr. Connor:

Q. Mr. Coady, please step down and show the films in chronological order.

A. Yes, sir.

• • • • •
 Mr. Klonsky: I wonder, your Honor, if this is going at a speed pre-set by the operator or something that can be slowed down or made faster. I am talking about the projector itself.

The Court: It seems to me everything is moving along at a pretty rapid pace. I don't know what you have it set at.

(Film ended.)

• • • • •
 * [fol. 201] By Mr. Connor:

Q. What was Mr. Salem doing at this time, when he was bent down?

A. He was jacking the car up.

Mr. Klonsky: Do you recall whether this jack he was using was a car jack of his own or the garage jack?

The Witness: I don't know. I didn't see him take it. I don't know where it came from.

Mr. Klonsky: Did you later find out in an attempt to test this jack to see what exertion was needed to move it?

The Witness: No, sir, I didn't.

• • • • •
 Mr. Klonsky: Mr. Coady, do any of your films show Mr. Salem walking more than four blocks without a cane?

• • • • •

By Mr. Connor:

Q. Is that Mr. Salem bending?

A. Yes, sir.

Mr. Klonsky: Do you see a limp there, Mr. Coady?

The Witness: Yes, sir, I certainly do.

Mr. Klonsky: You didn't testify before you saw a limp there.

The Witness: You didn't ask me about November 18th.

Recross examination.

By Mr. Klonsky:

Q. At the times you did see Mr. Salem using a cane, did you have your camera with you?

A. Yes.

Q. Were you clearly able to take photographs at those times?

A. I could have.

[fol. 202] Q. Why didn't you take photographs of him with the cane? Because it wouldn't help the defendant's case?

A. It would be silly to take it. I couldn't answer that.

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Boyd—Cross

Mr. Klonsky: I ask you the same question I asked Mr. Coady: Did you ever see Mr. Salem walk more than four blocks without a cane?

The Witness: I have never seen him walk more than four blocks.

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Mr. Connor: We have the large photographs.

The Court: I think the photographs you have in evidence pretty fairly represent it. Of course, they wouldn't be in evidence if they didn't fairly represent the situation.

I will sustain the objection to that.

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Balensweig—Cross

"Q. You referred to the hospital records which you say you had examined and you stopped sometime in early 1959 in your reading. Doctor, are you familiar with the record of September 14th, 1959?

"A. Yes.

"Q. Where the doctor at the Marine Hospital stated: 'Spondylolysis L-5 with first degree spondylolisthesis,' and very significantly, doctor, 'Weakness right leg probably due to nerve root irritation, L-5.'

"A. Well, I am sure I read that.

"Q. You did not read that to us, doctor.

"A. No, I didn't because I wasn't asked to come to that.

"Q. Let me ask you this: When all these records were given to you by the ship owner's attorneys, did they give you their own hospital records taken aboard their own vessel?

"A. Before I answer that question, may I make a statement that you are referring to September, 1959? [fol. 203] "Q. I am.

"A. I did not see those records.

"Q. Whatever you saw was what was given to you by the attorneys for the ship owner, is that not true?

"A. That's right.

"Q. My next question relates to something even more proximately related to the accident. That is the records of the ship itself while the man was in the ship's hospital right after the injury, did you see those?

"A. I did not.

"Q. Would you consider them significant for your findings?

"A. They would be helpful.

• • • • •
 "Q. Certainly from the ship's log itself, treated by a surgeon, a ship's surgeon, there is manifestation of much pain and much treatment for pain, is that not true?

"A. That's right. I don't believe that anybody could counteract that sort of examination. In other words, the man had an injury, he fell, he had signs of injury and he was treated for that. Nobody could say no.

"Q. More important to an examination several years after an occurrence would be the findings almost immediately after an occurrence?

"A. No. We are requested to make examination of the status of an individual as of the time we see them. It is nice to have all the facts if you can get them.

"Q. Which you did not get?

"A. Which I did not have.

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"Q. Certainly the real symptomatology related to an injury, to see if the injury was a cause thereof, would be that which is manifested almost immediately after the occurrence. That is more important and more significant than symptomatology that may be found years later.

"A. It is more important at the time of the injury.

"Q. This flattening of the lumbar curve, with tenseness of the long spinal muscles that you refer to in your first [fol. 204] examination, that would be a manifestation of spasm, would it not?

"A. It could be, yes.

.

"Q. The whole purpose of spasm is an anatomical splinting to cover an area of pain?

"A. That's right.

"Q. And pain in turn can relate itself to nerve root irritation?

"A. Yes.

"Q. That is usually so in these low back cases. That is a clinical finding or a clinical sign of low back nerve irritation when you have spasm, is that not true?

"A. In the general way, yes.

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"Q. These were given to Mr. Salem by the orthopedic department of the United States Public Health Service Hospital which had him under its care for many, many months, is that not true?

"A. That's right.

"Q. Would you say that they in the course of their protracted examination and observation would be in a

better position to determine whether this man should wear a brace than yourself?

"A. From a practical standpoint, yes.

"Q. Still you could not elicit from him an upward movement of the toes?

"A. On either side and on both occasions.

"Q. All these degrees and measurements that you gave with respect to how far he was able to raise his legs and bend over, they were not within normal limits?

"A. They were not within normal limits, not one of them.

"Q. This double straight leg raising test, he would only bring his feet up three inches?

"A. That's right.

"Q. That is not normal?

"A. That certainly is not normal.

[fol. 205] "Q. He assumed these prone positions very slowly with muscle guarding, is that not true?

"A. That's right. That is what he did.

"Q. When you say with muscle guarding, as contrasted with previously saying without muscle guarding—

"A. He protected his back.

"Q. Did you notice a tenseness in his back?

"A. Yes.

"Q. That would also be a sign of spasm, would it not?

"A. It is a sign of tightness. It can be part of spasm.

"Mr. Connor: You are excluding in your question the results of the doctor's examination.

"Mr. Klonsky: This doctor's examination?

"Mr. Connor: Yes.

"Mr. Klonsky: Yes, certainly. I ask you to do it impartially as you can on the hypothetical question that I have posed to you.

"A. On the hypothetical questions that you have propounded I would say he is not fit for duty.

"Q. And would you say that this is related to the acci-

dent of February 16th, 1958, with reasonable medical certainty?

"A. With the same effects as the same question before, I would still say that he is not fit for duty excluding my examinations and my opinion.

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MOTION FOR DIRECTED VERDICT

Mr. Klonsky: Then at this time the plaintiff moves for a directed verdict on the ground of unseaworthiness.

The Court: I will reserve my ruling until tomorrow morning.

Mr. Klonsky: I might also add for negligence as well.

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COLLOQUY

Does your Honor want to see that now?

The Court: Yes.

Mr. Klonsky: I join Mr. Connor, if he wants to read it. [fel. 206] Mr. Connor: That is material your Honor said would be left out.

The Court: Yes.

Mr. Connor: Did I put that on the record?

The Court: Let the reporter copy it in.

(Following portion copied into the record as directed:

"Patients inform me this man is having severe marital difficulties and apparently is involved in a legal battle re custody of his children.")

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Mr. Connor: The Richards cause of action.

The Court: Yes.

Mr. Connor: Your Honor knows my legal position with respect to that.

The Court: What is your legal position?

Mr. Connor: That Richards was engaged as an able seaman and not somebody in the hospital corps, and so on.

The Court: I remember that. I think a seaman aboard ship is employed not alone to sit up in that lookout, but if he sees his mate, his partner, his crew member, in trouble,

I think it is well within the course of his employment that he should do what he could.

Mr. Klonsky: Reasonably.

The Court: Reasonably in the situation, certainly.

Mr. Klonsky: Especially if he has already undertaken it.

Mr. Connor: He might be personally liable for his negligence, but I say in this respect the doctrine of respondeat superior does not apply.

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The Court: Let's talk about this one. Here is a chap in the blackness of the night, without a speck of light, for whatever reason, he is lying almost head down with his head against that ladder in the manhole and he is screaming for help. Richards comes out of the crow's nest a few feet away. In that situation, do you not think that that is in [fol. 207] the course of his employment reasonably to help his mate in that distress?

Mr. Connor: As a human being, I would say so.

The Court: I didn't say that. Don't you think that is reasonably to be regarded as in the course of his employment, one of the things reasonably to be contemplated by both of them, and reasonably to be included in the contract of employment, actually?

DEFENDANT'S SUMMATION

Mr. Connor: I would say this. I would expect one seaman to go help the other. But I would say that in the process of doing so, if the seaman did not use reasonable care, that lack of use of reasonable care is not chargeable to the ship owner.

The Court: I would say to you, Mr. Connor, that whatever rule of law we adopt, it ought to be a rule of law that would encourage seamen to help one another out in distressful situations resulting from the hazards of the sea. Certainly if he is going to get in trouble with the master if he is helping him out because the master said, "Now look out how you do this, Richards. If you happen to let him drop down the manhole, the ship will be liable, and I don't want you to be getting the ship into any trouble." I think that is a wrong principle. I think whatever principle is

adopted here is one that is going to encourage rather than to deter seamen in assisting one another. If there isn't such a principle, I am prepared to announce it here.

So the question is whether or not such men are loyal to their employer or are they loyal to the union and the members of the union.

Then he goes on to testify—and this is about the boldest thing I have ever laid eyes on for a doctor. But when did he make his diagnosis of a herniated disc or a slipped disc? After he looked at the X-rays, which he said you couldn't tell anything by. Is that an honest diagnosis? [fol. 208] Remember, too, that Dr. Graubard is not an orthopedist. He is what they call I think a traumatic surgeon.

Let me say this to you in closing. You are somewhat a trustee of the defendant's money.

You are a trustee of the defendant's money in a sense.

Of course, we don't want sympathy, because sympathy means charity. In a case of this nature charity will not compensate a man for what he has been through or what he will be through. Neither should you be motivated by cruelty, and cruelty is what you have if you look upon yourself as the trustees of the defendant's purse, as Mr. Connor wants you to think you are. You are trustees of justice in this case.

PLAINTIFF'S SUMMATION

Mr. Klonsky: I think it was decidedly unfair for Mr. Connor to keep referring to the union affiliation of plaintiff and certain other witnesses, which was outside the evidence, and which your Honor kept ruling out. I think it was unfair for Mr. Connor to say to the Jury, "You are the trustees of the defendant's money." They certainly

were not. I think it was certainly unfair to talk about the Jury being subjected to things taken out of pockets to pay one person or the other, which is something that should be divorced from the Jury, and it is not within their obligation to be concerned about it.

I think it was also very unfair to tell the Jury about the fact that plaintiff's crosses on his application for operator's licenses would adversely affect the general public, when he might have fainted while driving the car. That is nothing germane to the negligence and the fault of the defendant and his injuries in this case.

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[fol. 209]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—
No. 385—October Term, 1960.

*Argued May 10, 1961

Docket No. 26875

—
JAMES VICTOR SALEM, Plaintiff-Appellee,

—v.—

UNITED STATES LINES COMPANY, Defendant-Appellant.

—
Before:

Friendly and Smith, Circuit Judges, and Watkins, District Judge.*

—
Appeal by defendant United States Lines Company from judgment for plaintiff in the Southern District of New York, Willis W. Ritter, J., on a general jury verdict based

* United States District Judge for the Northern and Southern Districts of West Virginia, sitting by designation.

on negligence and/or unseaworthiness and an award of future maintenance and cure by the court. Reversed and remanded.

Walter X. Connor, New York City (Kirlin, Campbell & Keating, and James P. O'Neill, New York City, on brief), for appellant.

[fol. 210] Robert Klonsky, Brooklyn, New York (Herman N. Rabson and DiCostanzo, Klonsky & Sergi, Brooklyn, New York, on brief), for appellee.

OPINION—June 9, 1961

WATKINS, District Judge:

This is an appeal from an action wherein plaintiff-appellee sought recovery for injuries sustained while he was employed as an able bodied seaman on a vessel owned and operated by defendant-appellant. The action was based on allegations of negligence, unseaworthiness, and right of maintenance. Defendant appeals from a judgment against it totalling \$123,968.00, plus costs, made up of the following elements: (1) A general jury verdict for \$110,000.00 damages for personal injuries due to negligence and/or unseaworthiness; (2) A maintenance award by the court for \$13,968.00, including \$8,760.00 for three years future maintenance, and \$5,208.00 for past maintenance. Appeal is also taken from the order denying defendant's motion to set aside the verdict, for judgment for defendant *non obstante veredicto*, and for a new trial.

We feel this case must be reversed on two grounds: first, because of an erroneous and prejudicial instruction given by the trial judge; and second, because of a lack of evidence to support the trial judge's finding of three years future maintenance.

Appellee was an able bodied seaman on board the luxury liner S.S. United States. His principal duty on board was to act as lookout. He reported for duty at 12:00 midnight on the night of February 16, 1958, to his post in the crow's nest. The crow's nest is a lookout post located within the ship's radar tower, a hollow aluminum mast

which supports the ship's radar screens. At various levels [fol. 211] within the radar tower, are platforms, reached by a steel ladder running from the bottom of the radar tower to the top, a distance of some sixty-five feet. The platform which led to the crow's nest was some thirty-one feet above the deck. There were five electric lights within the tower, two below the crow's nest level, one approximately at the level of the crow's nest, and two higher in the tower.

When plaintiff reported for duty at midnight, all the lights were out except the one at the crow's nest level. He left the crow's nest at 2:00 A. M. on Monday, February 16, having stood two hours of his four-hour watch, and having been relieved at this time by a fellow seaman, one Richards. The accident complained of occurred when he was returning to duty at 2:30 A. M. At that time there was still only one light burning in the tower, the one at the level of the crow's nest. Plaintiff ascended the ladder to the platform at the level of the crow's nest and stepped with his left foot from the ladder to the platform. As he was carrying over the right foot, the remaining light in the tower went out, and the area was in complete darkness. His testimony is not clear as to whether he fell in the process of bringing his right foot onto the platform, or whether the fall occurred after he had both feet on the platform. At any rate, he fell, striking his head on the ladder, and his back on the edge of the platform. He saved himself from a further fall down through the tower by holding on to the ladder rungs. He then called for help, and Richards came to his aid from the crow's nest. Richards pulled him up to a sitting position on the platform, and asked him three or four times, "Can you hold yourself until I make a phone call?" Plaintiff finally answered, "Yes, I guess so." Richards then placed plaintiff on a narrow ledge with both feet dangling into the open space, with his arm around a pipe casing. Richards left to enter the crow's nest to telephone the bridge. Plaintiff then became dizzy, called [fol. 212] out for help again, but was not heard, and fell for the second time, losing consciousness. He fell to a point about eight feet below the crow's nest platform, where he was rescued by men with flashlights.

The complaint contained four causes of action, based on:

1. The negligence of defendant and its employees (Jones Act, 46 U. S. C. §688).
2. Negligence on the part of Richards, in that, while attempting to rescue plaintiff, he caused plaintiff to have a second fall.
3. The unseaworthiness of the vessel.
4. Recovery for past and future maintenance.

The trial judge instructed the jury among other things that their verdict should be for the plaintiff, "if you find the defendant was negligent in failing to provide railings or other safety devices." Due exception was taken to this and other portions of the charge.

There was no evidence of any kind in the record to support the view that railings or other safety devices could feasibly be constructed, or that failure to provide them constituted negligence or made the ship unseaworthy. Plaintiff and a seaman, Richards, testified that there was no railing inside the tower at the crow's nest level of the tower. However, there was testimony that there was a radar enclosure or casing which plaintiff could hold to, and did grasp with his left hand, as he stepped onto the platform. Plaintiff also testified that there was a shelf or stiffener encircling the inside of the tower about shoulder high as plaintiff stood on the platform. The tower enclosure varied from 36 to 48 inches in width so that plaintiff could have reached each side of the wall of the tower from the platform by raising his arms. There was no expert testimony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest. Should the jury, under these conditions, have been permitted to decide whether proper marine architecture required railings or other safety devices?

In two recent cases, this court has held that a jury should not be permitted to speculate on such matters in the absence of expert evidence. In *Martin v. United Fruit Co.*, 2 Cir. (1959), 272 F. 2d 347, a case involving a seaman

injured aboard ship while attempting to open an air port, the plaintiff contended on appeal that the trial judge had erred in failing to present an issue to the jury. In a *per curiam* opinion, affirming judgment for defendant, at page 349, this court stated:

"Finally, we reject the plaintiff's contention that the trial court committed error in not permitting the jury to determine whether the placement of the hinge at the bottom of the deadlight was an improper method of ship construction so as to make the vessel unseaworthy. Surely this is a technical matter in which an expert knowledge of nautical architecture is required in order to form an intelligent judgment. Since no expert testimony was introduced, it was correct to exclude this matter from the jury's consideration."

The case of *Fatoric v. Nederlandsch-Amerikaansche Stoomvaart, Maatschappij*, 2 Cir. (1960), 275 F. 2d 188, involved a seaman injured when struck in the hip by a cargo boom while working as a stevedore on the S.S. Veen-dam. The trial judge charged the jury that there were five separate theories upon which the jury might find the ship unseaworthy. One of these theories was the absence of a stopping arrangement to prevent the boom's swinging [fol. 214] against the kingpost. This court, in reversing judgment for the plaintiff, found that there was no evidence in the record to support this theory of unseaworthiness, and, at page 190, stated:

"In any event, the question was one of nautical architecture about which jurors lack the knowledge to form an intelligent judgment in the absence of expert testimony. *Martin v. United Fruit Co.*, 2 Cir., 272 F. 2d 347. Since there was no expert testimony on the matter, it should not have been submitted to the jury."

There is another error in this case which we feel requires reversal, and that is the finding of the court as to future maintenance. The trial judge properly withheld the question of maintenance from the jury in compliance with the conditions expressed by this court in *Bartholomew v.*

Universe Tankships Inc., 2 Cir., 279 F. 2d 911. There is no dispute here as to past maintenance, the sum of \$5,208.00 being agreed upon by both parties. The trial court awarded future maintenance computed on the basis of a period of three years at \$8.00 per day. The lump sum award for future maintenance was \$8,760.00.

The only evidence pertaining to a period of future maintenance, or the duration thereof, is the testimony of two doctors. Dr. Graubard testified to the effect that, at the time of the trial, plaintiff was still disabled and not capable of any work as a seaman. Dr. Kaplan testified to the effect that the likelihood of improvement was remote, and that it may be that plaintiff would get worse and require more specific therapy. There was no evidence that plaintiff required three years future treatment. Plaintiff's doctors did not testify as to probable duration of future treatment, if any. We do not think there was sufficient evidence upon which to base a finding of a three year future maintenance period.

[fol. 215] The two principal Supreme Court cases on the problem are *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525, and *Farrell v. United States*, 336 U. S. 511. In the *Calmar* case, the trial court had awarded a lump sum payment for maintenance to a seaman suffering from Buerger's Disease. The payment was based on the life expectancy of the seaman as the disease was confidently predicted to be incurable. The key language of the court is as follows:

"The seaman's recovery must therefore be measured in each case by the reasonable cost of the maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."

The language of the court, "immediate future" and "definitely ascertained" would militate in favor of a rather restricted area in which payments for future maintenance might properly be awarded.

The result in *Farrell* further strengthens this interpretation. There the court held that maintenance and cure payments would only be required until such time as the seaman was *cured or was found to be incurable*. (Emphasis added.) The extreme uncertainty surrounding either or both of these possibilities would appear to make any award for future maintenance improper in this case. For instance, in the instant case, there is, in addition to the possibility of plaintiff's full recovery from his back injuries, the further possibility that his not-so-latent psychotic condition might get the better of him at any time. If he became permanently insane, even if that condition were reliably linked to the accident, his maintenance payments would cease. Whatever the respective merits of a lump sum payment as [fol. 216] against successive law suits in the ordinary legal setting, the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure. Justice Jackson strongly hinted at this result in *Farrell*, at page 519:

"The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."

There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that three years is the period reasonably to be expected for Salem to reach maximum improvement.

Defendant makes two other points which we feel should be discussed here since this case is being remanded for a new trial:

1. A claim of absolute bar to recovery because of plaintiff's negligence.
2. The contention that defendant was not responsible for Richards' actions in attempting to rescue plaintiff.

Concerning the first point, the trial judge charged the jury that as a seaman, plaintiff does not assume the risk of an unsafe place to work and cannot be blamed for working in an unsafe place. There was no error in this instruc-

tion. *Darlington v. National Bulk Carriers, Inc.*, 2 Cir., 157 F. 2d 817. A seaman assumes no risk of employment even of obvious dangers when he acts under the orders of a superior officer. *Becker v. Waterman Steamship Corp.*, 2 Cir., 179 F. 2d 713. As to the issue of whether plaintiff should have called someone to replace the burned out light-bulbs, the jury apparently resolved it in plaintiff's favor, and it is not proper for this court to retry factual issues [fol. 217] where there is evidence to sustain the finding below. There is such evidence in this case.

As to point number two, we feel that Richards' employer, defendant herein, was responsible for the actions of Richards in attempting to rescue plaintiff. See Judge Soper's opinion in *Harris v. Penn. R.R. Co.*, 4 Cir., 50 F. 2d 866, 868; *Buckeye Steamship Co. v. McDougal*, 6 Cir., 200 F. 2d 558, cert. den. 345 U. S. 926, affirming 103 F. Supp. 473. Defendant cites the case of *Robinson v. Northeastern Steamship Corp.*, 228 F. 2d 679, to the effect that a seaman, voluntarily assisting another seaman in distress is not acting within the scope of his employment, unless the rescue is authorized by the employer. That case is readily distinguishable from the case at hand. In the *Robinson* case, an intoxicated seaman, returning to his vessel from shore leave, was run over by a locomotive within a customs compound adjacent to the dock. The locomotive and the customs compound were not owned or controlled by the shipowner. The court in that case was careful to limit its holding to the facts: where the accident occurred not on the ship, but on land. We do not think the law in that case applies to rescue situations occurring aboard ship where the seaman being rescued is injured while performing his duties.

We think the correct law applicable to this case to be that the shipowner owes an obligation to effect prompt and proper rescue to a seaman injured in the performance of his duties aboard ship, and that a seaman who undertakes such a rescue is acting within the scope of his employment, the employer being liable for his actions if the rescue operation is conducted negligently.

Since we have found prejudicial error in the charge to the jury, we conform to the language in *Fatovic v. Nederlandsch-Amerikaansche Stoomvaart*, *supra*:

[fol. 218] "Since we cannot determine from the general verdict brought in by the jury whether they relied upon a proper or improper claim of unseaworthiness in reaching their decision, we must reverse the judgment and order a new trial."

The judge could have insulated the error in the charge recited by submitting special interrogatories, as is frequently done in such cases, but he chose not to do so.

In view of our conclusion that there must be a new trial, we believe it unnecessary to discuss the many other errors complained of.

Reversed and remanded for a new trial consistent with the foregoing opinion on the issues of negligence, unseaworthiness, and future maintenance. Affirmed as to past maintenance award in the sum of \$5,208.00.

SMITH, Circuit Judge (concurring in part and dissenting in part):

I concur in the reversal of the award for future maintenance and cure, for the reasons stated in the opinion. I also agree with the opinion on assumption of risk and responsibility for the fellow seaman's rescue attempt.

From so much of the judgment as reverses the jury award for unseaworthiness or negligence, I respectfully dissent. As the majority points out, the crow's nest was more than thirty feet above the ship's deck with access to the outdoor lookout post obtainable through an internal radar tower. The straight ladder ascending the radar tower faced 180° away from the platform leading out to the crow's nest; reaching the platform entailed the rather dangerous maneuver of transferring one foot at a time from the ladder while turning the body completely around. There was before the [fol. 219] jury sufficient evidence, both from oral testimony and from photographs, for it to visualize the platform on and from which plaintiff fell and to determine whether some railing or hand hold in addition to the structures present was reasonably necessary for the protection of a seaman passing from the ladder to the platform in the swaying mast.

I do not believe that either the *Martin* or the *Fatovic* case stands for the blanket proposition that any and all theories of negligence and/or unseaworthiness which might touch on the broad field of "naval architecture" may be properly submitted to a jury only if supported by expert testimony. Here the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the handholds furnished were sufficient to discharge the owner's duty to provide his seamen with a safe place to work. Such a determination hardly requires expert knowledge of naval architecture,¹ such as may be required to determine proper construction of deadlights, or the feasibility of a stopping arrangement to prevent a boom from swinging against a kingpost. I would approve the charge on railings or other devices and affirm the award for personal injuries and past maintenance.

[fol. 219a]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. Henry J. Friendly, Hon. J. Joseph Smith,
Circuit Judges; Hon. Harry E. Watkins, District Judge.

JAMES VICTOR SALEM, Plaintiff-Appellee,

v.

UNITED STATES LINES COMPANY, Defendant-Appellant.

JUDGMENT—June 9, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

¹ It is somewhat difficult to conceive in what way the construction of railings on an indoor platform would not be "feasible" from the standpoint of naval architecture. If such were the case, however, it would seem more sensible to have the defendant introduce such evidence.

Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to the past maintenance award in the sum of \$5,208.00.

It is further ordered, adjudged, and decreed that said judgment be and it hereby is reversed on the issues of negligence, unseaworthiness, and future maintenance and that said action be and it hereby is remanded for a new trial consistent with the opinion of this Court; with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 219b] [File endorsement omitted]

[fol. 219c] Petition for rehearing covering 18 pages filed June 15, 1961 omitted from this print.

It was denied by order June 21, 1961.

[fol. 232]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present: Hon. Henry J. Friendly, Hon. J. Joseph Smith,
Circuit Judges; Hon. Harry E. Watkins, District Judge.

JAMES VICTOR SALEM, Plaintiff-Appellee,

v.

UNITED STATES LINES COMPANY, Defendant-Appellant.

ORDER DENYING PETITION FOR REHEARING—June 21, 1961

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 233] [File endorsement omitted]

[fol. 233a]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES VICTOR SALEM, Plaintiff-Appellee,

v.

UNITED STATES LINES COMPANY, Defendant-Appellant.

Before Friendly and Smith, Circuit Judges, and Watkins, District Judge.

On petition for Rehearing.

Herman N. Rabson, New York City, and Robert Klonsky of DiCostanzo, Klonsky & Sergi, Brooklyn, N. Y., for Plaintiff-Appellee.

ORDER DENYING PETITION FOR REHEARING—June 21, 1961
Per Curiam:

Petition for rehearing denied.

H. J. F., U.S.C.J.
H. E. W., U.S.D.J.

I dissent from the denial of the petition for rehearing.

J. J. S., U.S.C.J.

June 21, 1961.

[fol. 233b]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES VICTOR SALEM, Plaintiff-Appellee,

v.

UNITED STATES LINES COMPANY, Defendant-Appellant.

ORDER DENYING PETITION FOR REHEARING IN BANC
—August 7, 1961

Herman N. Rabson and DiConstanzo, Klonsky &
Sergi, Brooklyn, N. Y., for plaintiff-appellee.

The petition for rehearing in banc is denied, Judge Clark and Judge Smith dissenting.

Judge Waterman votes to deny with the following statement:

An examination of the whole record convinces me that the full retrial ordered by the panel majority is desirable. However, with Judge Smith "I do not believe that either the *Martin* or the *Fatovic* case stands for the blanket proposition that any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a jury only if supported by expert testimony."; and I find no reversible error in the failure at the former trial to so charge the jury.

J. Edward Lumbard, Chief Judge.

7 August 1961

[fol. 233c] [File endorsement omitted]

[fol. 234] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 235]

SUPREME COURT OF THE UNITED STATES

No. 283—October Term, 1961

JAMES VICTOR SALEM, Petitioner,

vs.

UNITED STATES LINES COMPANY.

ORDER ALLOWING CERTIORARI—October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 283

FILED

AUG 3 1961

JAMES R. BROWNING Clerk

Supreme Court of the United States

OCTOBER TERM, 1961

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On Petition

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Supreme Court of the United States

OCTOBER TERM, 1961

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner, James Victor Salem, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed June 9, 1961, and the denial of a petition for rehearing, without opinion, filed June 21, 1961, reversing a final judgment entered in the United States District Court for the Southern District of New York on December 9, 1960 on a general jury verdict based on negligence under the Jones Act (46 U. S. C. 688) and/or unseaworthiness, and an award of future maintenance by the Court. The award for past maintenance was affirmed and is not a part of this petition.

The opinion of the Court of Appeals, made a part of the appendix to this petition, with a dissenting opinion by J. J. Smith, *C.J.*, are not yet officially reported. There was no opinion by the trial Judge, W. W. Ritter, *D.J.*

Jurisdiction

Judgment was entered in the United States Court of Appeals for the Second Circuit on June 9, 1961.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. 1254(1) and 2101, as well as Rules 19(b) and 20 of the Rules of this Court. The Jones Act (46 U. S. C. 688) was the basis for federal jurisdiction in the Court of first instance.

Questions Presented for Review

I

Should a general verdict for a seaman by a jury in a Jones Act case be set aside where the majority opinion concedes there was evidence sufficient to support it, but predicates reversal on the absence of testimony by an expert on naval architecture with respect to the obvious danger of an unprotected deep opening in a vessel at sea, not involving any complex or technical details beyond the ken of a lay juror?

Fairly comprised in this question are the following:

1. Is there not an obvious invasion of the jury's province to decide an issue of fact pertaining to ordinary standards of conduct of safety and danger?

2. Is there not a dilution of a Jones Act seaman's right to a trial by jury instead of a trial by experts on simple issues of obvious danger?

3. Where there is no testimony by an expert on naval architecture offered by either party at the trial, but there is substantial testimony offered by petitioner with respect to

the obvious lack and need of a railing or other safety device on a platform adjacent to a man-sized opening, supplemented by photographs and diagrams, does not the Court of Appeals invade the trial Court's function to decide whether there is need for an expert?

4. Is there not a violation of petitioner's rights under the Seventh Amendment to the Constitution?

5. Is testimony by an expert on naval architecture with respect to the need for, or the feasibility of construction of a railing or safety device, necessary to support an instruction to the jury that a verdict for the plaintiff might follow "If you find the defendant was negligent in failing to provide railings or other safety devices," related to a platform adjacent to a man-sized opening, 31 feet up in a swaying radar tower, completely enclosed and in absolute darkness, where substantial testimony by officers and crew members, supplemented by photographs and diagrams, clearly demonstrated the absence and need of a railing or guard line?

6. The dissenting opinion points to the majority's improper invasion of the jury's fact-finding function, relating it to a clearly erroneous blanket proposition that "any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a jury only if supported by expert testimony" (p. 11a of appendix to petition). The dissent supports petitioner's position that a seaman's rights are diluted if an expert is required where "... the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the handholds furnished were sufficient to discharge the owner's duty to provide his seamen with a safe place to work" (p. 11a of app.).

II

Where the trial Court by consent of the parties passed on the cause for future maintenance and determined from the voluminous medical evidence that petitioner was deserving of a maintenance award for three additional years, was this "clearly erroneous" and justified on a ground expressed in the majority opinion that "... the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (p. 8a of app.)?

Statute Involved

The Jones Act, 46 U. S. C. 688, as follows:

Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

Statement of the Case

Petitioner was caused to sustain permanent injuries inside respondent's radar tower on February 16, 1958, while employed as a lookout able-bodied seaman aboard the SS United States at sea. This enclosed radar tower is described in the majority opinion below as "a hollow aluminum mast" about 65 feet high. The crow's nest plat-

form is within the tower, approximately 31 feet up, reached by the use of a vertical ladder, at which point a man-sized opening must be crossed. As further described in the dissenting opinion below, "The straight ladder ascending the radar tower faced 180 degrees away from the platform leading to the crow's nest; reaching the platform entailed the rather dangerous maneuver of transferring one foot at a time from the ladder while turning the body completely around" (p. 10a of app.).

At the time of the accident there were five ordinary household light bulbs within the tower, at intervals one above the other. The two bulbs above the crow's nest platform that would have cast illumination thereon had been out of commission for several months. The two bulbs below the crow's nest platform were also unlit and had been the subjects of attempted but unsuccessful repair several days before. The relationship of the remaining light to the accident at the crow's nest platform, which was shown to be smooth and worn, without any railing or life-line, is described in the majority opinion, as follows:

"Plaintiff ascended the ladder to the platform at the level of the crow's nest and stepped with his left foot from the ladder to the platform. As he was carrying over the right foot, the remaining light in the tower went out, and the area was in complete darkness. His testimony is not clear as to whether he fell in the process of bringing his right foot onto the platform, or whether the fall occurred after he had both feet on the platform. At any rate, he fell, striking his head on the ladder, and his back on the edge of the platform" (p. 3a of app.).

The second incident where Richards, a fellow seaman, negligently attempted a rescue by leaving the dazed peti-

tioner in total darkness on a narrow ledge, feet dangling down in the 31 foot hole, thereby falling again, is resolved by the entire panel below in petitioner's favor. The majority below concedes this alone would have supported the judgment for petitioner had there been a special finding. Because there was no request for special interrogatories the Court and parties relied on a general verdict. The majority reversed the general verdict, though conceding it was amply supported by proof of negligent rescue and on the issue of inadequate illumination, as follows:

"As to the issue of whether plaintiff should have called someone to replace the burned out light-bulbs, the jury apparently resolved it in plaintiff's favor, and it is not proper for this court to retry factual issues where there is evidence to sustain the finding below. There is such evidence in this case" (pp. 8a, 9a of app.).

Reversal was predicated on an instruction by the trial Judge that a verdict for plaintiff might follow "If you find the defendant was negligent in failing to provide railings or other safety devices" (p. 4a of app.). The basis for reversal was "There was no expert testimony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to the crow's nest" (pp. 4a, 5a of app.).

The petition for rehearing referred to the testimony of witnesses as to the lack of and need for a railing or guard-line on the platform and the inadequacy of the large radar casing used as a support to swing over from the ladder to the platform. This was buttressed by decisional authorities that clearly established the principle that the

absence of any protective device about an opening aboard ship, particularly at sea, was a matter of fairly obvious potential danger. Petitioner also contended that the lack of a railing, hand-hold or guard line was not so complex and beyond a lay juror's ken that an expert's testimony should be allowed to displace a part of the jury's independent fact-finding function. Again Judge Smith dissented from the denial of the petition for rehearing without opinion.

The overall significance of the error by reversal of the general verdict, gravely adverse to the statutory and decisional rights of seamen, "wards of the admiralty", as well as all future juries which heretofore enjoyed a respected function in Jones Act suits, is strikingly apparent in the instant record of multiple breaches by respondent of its elementary obligations to a seaman. Neither opinion below sets forth the full picture of all the dangers and conceded failures to act by officers and crew members. Petitioner contended that his motion at the close of proof for a directed verdict, was eminently proper and should have been granted. In this light the obscure issue of an alleged infirmity in an instruction to the jury on "railings or other safety devices" should be deemed moot. Hereinafter we concisely set forth additional facts as they relate to the questions presented for review.

1. The dangerous and unseaworthy condition of the crow's nest platform:

At the time of the accident the log entries indicate the vessel was rolling and pitching in a rough west north-westerly sea, seven degrees to portside and six degrees to starboard side, the weather overcast with passing rain squalls. The vessel's great speed caused much vibration, particularly transposed to the 65 foot hollow mast encom-

passing the crow's nest. The platform on which petitioner had to step from the ladder was smooth, partly worn away and without any and adequate hand-holds, railings or life-lines. (It was not painted with any skid-proof material, and respondent's answers to interrogatories that it had been painted with such material were proven untrue by the testimony of its own witnesses.

The deposition of Trendell Terry, plaintiff's exhibit 19, sets forth the need for a railing or similar device at the crow's nest platform. When he testified he was still employed by respondent, having served with it since 1950, and with the experience of 160 to 186 voyages on the S.S. United States, as a lookout A/B, having used the ladder and platform in question about 88 times each voyage. On page 92 he refers to the smooth and slippery condition of the platform, without any non-skid paint, and further "There certainly should have been a railing or life lines on this platform to grab." He described the large and cumbersome pipe casing as the only handhold available, in the following words:

" . . . but it's not very convenient because it's so big and round, big and bulky, that you couldn't get a good grip . . . I never use it" (pp. 11 and 12 of deposition).

Terry also confirmed the absence of any life line, its purpose meant to be a "safety measure to grab hold onto to protect yourself until you're safe" (p. 25 of deposition).

Similarly did Louis Tribble, the other A/B lookout testify on the absence of a necessary safety device. His deposition was marked plaintiff's exhibit 18, wherein he recited his extensive marine background, including a rating as a second mate. With respect to the rectangular pipe casing referred to in the majority opinion below, he testi-

fied he never used it as a handhold for the following reasons:

"A. Well, because I don't ever grab hold of anything that has electrical current going through, plus the fact that it was too big to grab hold of" (pp. 87 and 88 of deposition).

He also affirmed there was nothing on the platform "to grab hold of or to bridge over the space" (p. 23 of deposition).

Richards also testified that there was absent any handholds, rails or lifelines at the crow's nest level, corroborating Salem who testified that the pipe casings were too big and cumbersome to grab when coming onto the platform from the ladder.

2. The dangerous and unseaworthy condition of the lights within the radar tower:

It was the testimony of Richards, the relief lookout A/B who had rescued petitioner and then negligently left him unattended to fall the second time, that the two upper lights had not been lit for at least two voyages and had they been on they would have illuminated the crow's nest platform. Chief Quartermaster Barton testified that he had previously noted and reported trouble with the radar tower lights to the ship's electrician six days before the accident, and the chief electrician testified that he assigned the second electrician to check "what might be causing lamps to burn out". It is uncontradicted that household bulbs were used, not anti-vibration or "rough service bulbs", thereby requiring the replacement of 500 to 600 burned out bulbs a day during each voyage. The second electrician had replaced the two lower bulbs in the radar tower on February 10, 1958, without checking its adequacy

from that date to the time of the accident, despite knowledge that "... the two bottom lights were burning out too often". The two upper lights were left unlit as they had been for several months.

3. The occurrence of the accident by reason of the unseaworthiness and conceded negligence of respondent and its vessel:

After the last light went out to leave petitioner in total darkness, he slipped just after he had released his precarious hold on the bulky radar casing; both hands were then at his side, as he hadn't yet time to extend his arms to reach the sides of the radar tower for whatever makeshift support he may have found by touch alone. Petitioner was compelled in absolute darkness to move away from the edge of the unprotected platform. The only light on went out just as he was carrying his right foot over the 31 foot opening between the up and down ladder and the smooth, partly worn platform, absent any perforations or skid-proof material to allow friction for a secure footing.

4. Petitioner's injuries, hospitalizations, medical testimony and the award for future maintenance:

The 37 year old petitioner had joined the S.S. United States in September, 1956 as an ordinary seaman. Thereafter he was soon promoted to the responsible position of lookout A/B. His several pre-voyage physical examinations while in respondent's employ were unremarkable, and there was no entry produced from any medical log of an illness, complaint or injury prior to February 16, 1958. His superior affirmed a satisfactory work record and that he got along well with the other men. His annual earnings were \$5,656.76, a loss of over \$15,000.00 to the time of trial.

The terror and trauma of the instant accident produced such profound physical and psychiatric changes that he is permanently unemployable as a seaman and in need of extensive orthopedic and psychiatric treatment, and now undergoing rehabilitation. Respondent's personal injury report synthesized its extensive day by day ship's medical record that was not sent on to the U. S. Public Health Service Hospital, or even shown to its own testifying doctors, as follows:

"Probable fracture or dislocation of vertebra with spinal nerve injury. Paralysis and anesthesia right leg. Concussion of brain. Sedation, bilateral traction of both legs; hospitalized 16 through 18 of February, '58".

He was transferred by ambulance, tied down in a stretcher, to the U. S. Public Health Service Hospital, Stapleton, S. I., where he remained as an inpatient for extended periods and as an outpatient to the present day. There is noted a "weakness right leg probably due to nerve root irritation, L-5", myofascial disease and a "chronic schizophrenic reaction, undifferentiated type, conversion reaction", as well as a paralysis of the small intestine in the area of the lumbar spine. A September 16, 1960 entry sets forth—"do not believe that this patient will ever be fit for sea duty when back condition and N.P. situation considered together".

Dr. David J. Graubard, a traumatic surgeon, and Dr. Laurence I. Kaplan, a neuropsychiatrist, testified that petitioner was permanently disabled, never again able to return to sea, and suffering from continuing effects of a herniated intervertebral disc and a severe mental condition, traumatically caused. Dr. Kaplan also concluded that the accident prompted a severe post-traumatic reaction which

bordered on or actually was psychotic while he was in the hospital, expressing a prognosis of long disability with the likelihood of improvement remote, and that it may be that petitioner would get worse and require more specific orthopedic or neurosurgical therapy. Certain motion pictures taken of petitioner by respondent's investigators, shown to the Court and jury, clearly depicted his worsening condition over an extended period of time. On all this proof the trial Court granted petitioner three years future maintenance on the basis of \$8.00 a day, as follows:

"The Court: It seems to me that the poor man ever since the accident in 1958 has been trying to get relief from this condition, trying to get some assistance, to get well, to get on his feet. He made a couple of attempts to go to sea, which was unsatisfactory. There is a report in the medical record that he is still not fit for duty. He has a rehabilitation program to go through. There is a long medical history here, exhaustively gone into on the trial of this case. In my view he has not reached that point where maintenance should be cut off. At this time my judgment is three years is a reasonable time within which to anticipate that he is going to need it, and I am going to allow it upon that basis, and on the basis of the \$8 a day."

This was reversed and remanded meaninglessly by the Court below on the following:

"Whatever the respective merits of a lump sum payment as against successive law suits in the ordinary legal setting, the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (pp. 7a, 8a of app.).

Reasons for Granting the Writ

The overriding national significance of this case is that it has so far departed from the accepted and usual course of judicial proceedings related to the fact-finding function of a jury as to ordinary standards of conduct of safety or danger on Jones Act negligence and unseaworthiness, and a trial Court's determination on the submitted cause for future maintenance, that without the exercise of this learned Court's power of supervision it will remain in conflict with decisions of other panels of the Court of Appeals for the Second Circuit and other Courts of Appeal, as a landmark of retrogression and disregard for the mandate of this Court expressed in prior decisions. The dissent by Chief Judge Clark in *Palermo v. Luckenbach Steamship Co., Inc.*, 246 F. 2d 557 (C. C. A. 2d), reversed summarily by this Court at 355 U. S. 20, 78 S. Ct. 1, is equally applicable here, as follows:

"I have had occasion recently to express my concern at a growing tendency in this court to upset awards in jury cases . . . Today's decision continues that trend, adding some new curiosities." (P. 561 of 246 F. 2d.)

The "new curiosities" in the instant case are strained reasons to support underlying premises against jury verdicts for seamen, on an unjustified concern that in determining questions of negligence juries will fall short of a fair performance of their constitutional function.

On the simple issue of fact related to the need or feasibility of construction of a railing or lifeline on a platform, 31 feet up in an enclosed radar tower, alongside a man-size opening, the majority below ignores the ample testimony for petitioner on the lack of a protective device and the need therefor, but instead requires the unneces-

sary testimony of a naval architect. If required in this case, it will become the *modus operandi* in every subsequent trial where a simple ship's fixture or appurtenance is involved. This will promote the evil of protracted trials, experts pitted against experts, compounding the wrong by an improper invasion of the jury's independent fact-finding function. The use of expert testimony should be sparing, and limited to complex factual issues beyond the lay juror's ken. Respondent did not offer an expert on naval architecture, nor was there any exception recorded by respondent that petitioner was so required to support his contentions on the clear and simple issues involved.

The majority opinion below ignores a basic premise in the use of expert testimony, long ago expressed by this Court in an even more complicated issue on the construction of a patent, in *Winans v. The N. Y. and Erie Railroad Co.*, 62 U. S. 88, 21 How. (U. S.) 88, 101, 16 L. Ed. 68 (1858), as follows:

"Experience has shown that opposite opinions of persons professing to be experts, may be obtained to any amount; and it often occurs that not only many days, but even weeks are consumed in cross examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury; and perplexing instead of elucidating the questions involved in the issue".

Inconsistently, the majority opinion below concedes that the general verdict is supported by substantial proof in the record. A new curiosity is advanced that the jury verdict was not conclusive on all issues raised by the pleadings and submitted to the jury because a small part of the Charge, raised in passing in the briefs below and not even

referred to in oral argument, renders wholly defective a general verdict sought by the parties without a request for special interrogatories.

On the uncontradicted fact that there was a total absence of any illumination at the time of accident, compounded by the prolonged absence of illumination from the upper two lights, a directed verdict for plaintiff on the ground that this condition at the very least contributed to the accident, was necessary and proper. If so, this would make immaterial any error of instruction related to finding liability. See Rule 61, F. R. C. P. on "Harmless Error."

There was sufficient evidence of the need for a railing or other safety device, such as a rope line to guide and protect plaintiff while in complete darkness, for skid-proof paint on the platform proper, or even a flashlight that was not provided, to allow plaintiff to move safely on the platform to the crow's nest.

Finally, and now consistently, the majority opinion set aside the trial Court's determination of future maintenance without mention or regard for his fact-finding function within the framework of the "clearly erroneous" principle expressed by this Court in *McAllister v. U. S.*, 348 U. S. 19, 75 S. Ct. 6. This cause is also remanded with the limitation that "... the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure."

Reason and the cases cited hereinafter under specific points unequivocally support petitioner's contention that here is a compelling need for this learned Court to express its humane mandate for seamen as "wards of the admiralty", so that all future Jones Act cases will be resolved on the law expressed by the Supreme Court and not by the "curiosities" in the majority opinion below.

POINT I

To reverse a general jury verdict in a seaman's case because an expert was not called to temper the jury's fact finding function where the compounded danger of an unprotected hole was "fairly obvious" and within a lay juror's experience and ken, is contrary to all decisional authorities on similar issues, and in disregard of this Court's clear and consistent mandate on the inviolable constitutional function of a Jones Act jury.

Any layman is familiar with platforms and ladders. The usual partly inclined ladder or stairway with railings can readily be compared from his everyday experiences with a vertical ladder to be ascended to a point where the platform without a railing or line for support is behind and beyond an opening 31 feet deep. To hold that a railing to grab, or a safety device in the nature of a guard line or similar hand-hold, must be the subject of testimony by a naval architect, is equivalent to a holding that a jury is not fit to pass on simple issues of obvious danger in any case. This is the sense of the dissent herein and the common sense of the matter.

The basic rules in the use of expert testimony are clearly ignored by the majority opinion below. They are set forth in a leading text on the subject, Rogers, *The Law of Expert Testimony*, 3rd Ed., 1941, Matthew Bender, Inc., Albany, N. Y., at pp. 50, 51, as follows:

"Within the rule excluding such evidence are ordinary standards of conduct of safety or danger, the operation of well known natural laws and the existence of social customs . . . If the facts can be placed before a jury and are of such a nature that jurors generally are just as competent to form opinions in reference

to them and draw inferences from them as witnesses, the opinion of experts cannot be received. The fact that the expert witness may know more of the subject and better comprehend and appreciate it than the jury is not sufficient to warrant the introduction of his testimony".

See *Schillie v. Atchison, Topeka & Santa Fe Ry. Co.*, 222 F. 2d 810, 814, that:

"The determination of its admissibility is largely within the discretion of the trial court under the peculiar circumstances of each case."

Decisional references to the need for and feasibility of construction of simple railings or guard-lines around open holes, particularly for deep openings on merchant vessels, necessarily prompt the conclusion that the obvious danger in the instant case was within a jury's province to determine "ordinary standards of conduct of safety or danger", supported by the testimony of Terry, Tribble, Richards and others who testified from their immediate experience and expertise on the particular factual situation involved, which testimony was supplemented by photographs and diagrams.

In *Zinnel v. United States Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47 (C. C. A. 2d, Dec. 1925), Learned Hand, C.J., wrote that a seaman ordered upon deck cargo without being provided a guard line was deserving of jury determination without an expert's opinion, as follows:

"Without some guard line we need no expert to show us that a case was presented, which a jury must decide, as to the safety of the place where the intestate was ordered to work. Indeed, it seems to us hard to see how a jury could find for the defendant on this issue,

as well as on the issue of the absence of the line" (p. 48 of 10 F.^{2d}).

Augustus N. Hand, *C.J.*, in *Kennair v. Mississippi Shipping Co., Inc.*, 197 F. 2d 605 (C. C. A. 2d, June 1952) held for a seaman who fell through an unlighted elevator shaft, by affirming a jury verdict predicated on the absence of an indicator or other device on deck to show where the elevator was at a given time. A similar contention to that involved herein was answered as follows:

"It is urged by the defendant that there is no evidence in the record as to what type of safety device a reasonably prudent shipowner would have, nor any evidence as to what precautions were taken on other vessels. But such evidence was not necessary; for it was the function of the jury to apply the standard of care—what was reasonable under the circumstances—to the facts presented to it. *Bailey v. Central Vermont Ry., Inc.*, 319 U. S. 350, 353, 63 S. Ct. 1062, 87 L. Ed. 1444" (p. 606 of 197 F. 2d).

To require a marine architect to testify on the need for and construction of a railing or the placement of a life line at and about an unilluminated hole, 31 feet deep, through which a person's body could and did fall, is to drastically reduce the fact-finding function of a jury in a seaman's case. Cases are legion on the inviolability of a federal jury's function and need not be cited. See: *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457; *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6, 11 (Nov. 7, 1960); *Schultz v. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608.

This Court in *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, 98, 64 S. Ct. 455, held that "A finding of seaworthiness

is usually a finding of fact", and at p. 104 related it to "supply and keep in order the proper appliances appurtenant to the ship". On the basis of the majority reasoning below in the instant case, a defective rope or cable should not prompt liability unless there be testimony by an expert that there is need for an adequate one that could "feasibly" be manufactured. Such result is no less strained than that related to a railing or line on a platform adjacent to a man-size opening in the enclosed radar tower.

Clark, *C.J.*, in *Krey v. U. S.* (C. C. A. 2d, Dec. 1941), 123 F. 2d 1008 at p. 1010, pertinently held on the absence of any handle or rail in a ship's shower-room while the vessel was in port, much less dangerous than the instant factual situation, as follows:

"Viewed as a shower to be used at sea, the absence of any sort of handle or rail for support is alone almost enough to condemn it."

As the absence of a railing or similar device was held to be a simple issue and clearly unsafe in the cases cited above, without the need for an expert to tell the obvious, then how much more unnecessary is an expert where the absence of any rail or line is in the context of a speeding vessel at sea, the radar tower subject to excessive vibration, compounded by the long inadequate and then foreseeable total absence of any illumination?

The Supreme Court in *Milwaukee & St. P. R. Co. v. Kellog*, 94 U. S. 469, affirming 5 Dill. 537, 1 Cent. Law J. 278, long ago expressed the maxim that experts are not permitted to state their conclusions where the subject of proposed inquiry is a matter of common observation upon which the lay or uneducated mind is capable of forming a judgment. This principle was recently reaffirmed by Mc-

Nally, J., in *Clark v. Iceland Steamship Company, Ltd.*, 179 N. Y. S. 2d 708, 6 A. D. 2d 544 (App. Div. 1st Dept., Nov. 1958), holding that opinion evidence was inadmissible as to adequacy or inadequacy of ship construction related to the absence of a life line between stowed hatch covers and the ship's rail. He wrote that seaworthiness is generally a jury question, not to be tempered by an expert's opinion, where the need of a life line was so clearly within the "ken of the experience, observation and knowledge of laymen" (p. 714 of 179 N. Y. S. 2d). Plaintiff's verdict was therefore reversed on the very ground that would have affirmed it in the instant case.

See: *Desrochers v. United States*, 105 F. 2d 919, 920 (C. C. A. 2, July 1939).

The obvious liability following failure to provide a handhold or rail was expressed by Dawson, D.J. in *Campbell v. Tidewater*, 141 F. Supp. 431 (U. S. D. C., S. D. N. Y., June 1956), citing *Schirm v. Dene Steam Shipping Co.*, 222 F. 587 as follows:

"If a ladder is set on such a substantial incline that, in order to maintain his equilibrium, the user is compelled to hold himself away from the ladder, then, of course, he must have a handrail, or something else extending above the ladder, to hold on" (p. 435 of 141 F. Supp.).

See: *The Leontios Teryazos*, 45 F. Supp. 618, 622, the Court stating:

"A ship should not be regarded as seaworthy unless there is some protective means to prevent its employees from falling down into the bunker. To hold otherwise would be a return to the dark past when little protection was afforded men of the sea."

It was the burden of respondent to establish instead that the construction of a railing or other safety device on an indoor platform would not be "feasible" from the standpoint of naval architecture. This it did not do. There is neither a complex issue nor any reason to support the need for expert testimony on this subject by either side. The issue is not on the sufficiency of evidence *per se*, as the Court of Appeals stated there was substantial evidence sufficient to support a judgment. The issue is whether a lay jury could understand this substantial evidence without the refined explanation by a self-styled expert. If this be so, respondent failed to substantiate its own defense, and contention on appeal as to the non-feasibility of construction of a railing or other safety device. It did not except on any question related to expert testimony, as none was raised. As there was no expert offered by either side, obviously the evidence submitted without being tempered by such testimony should be deemed sufficient to support the instruction on railings or other safety devices.

In this light, petitioner respectfully refers again to the dissenting opinion below, particularly where reference is made to the feasibility of constructing a railing on an indoor platform (which also means to provide a simple life line as used on every vessel); and that the burden to show such a simple undertaking could not be done should properly devolve on the shipowner. See: *The Pennsylvania*, 86 U. S. 125; *Mason v. Lynch Brothers Company*, 228 F. 2d 709, 712; *Hill, Jr. v. Atlantic Navigation Company*, 218 F. 2d 654. In *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, this Court held that the burden was upon the one setting up a seaman's release to establish the facts concerning its validity. Its parallel to the feasibility of constructing a railing in the vibrating 65-foot hollow aluminum radar mast is apparent.

As a result of the general verdict petitioner established the negligence of respondent and the unseaworthiness of its vessel. Respondent did not offer evidence or support its defense on the adequacy of the crow's nest platform and lights. It is unquestioned that all the lights were out when petitioner slipped and fell, and that he slipped and fell because of the multiple dangers known to respondent's responsible officers and crew-members. Respondent was bound by all issues submitted and the jury verdict was conclusive on all issues raised by the pleadings and submitted to the jury.

Where the conditions are aggravated by the absence of illumination, then the cases are even stricter on a ship-owner with respect to the clear and simple requirement of a handrail or similar device. In *Read v. United States*, 201 F. 2d 758 (C. C. A. 3, February 1953), on the allegations of failing to provide sufficient lighting facilities and also to provide safeguards around the open deep tanks, solely on the issue of defective lighting appliances it was held there was a "failure to supply and keep in order the proper appliances appurtenant to the ship" so as to prompt unseaworthiness.

Also in point is *Johnson v. Griffiths S.S. Co.*, 150 F. 2d 224 (C. C. A. 9, June 1945), where the body of a seaman was found in an open hatch under conditions of poor visibility, and other dangers, including pitching of the vessel. Under these circumstances the Court held as follows:

"It is the duty of a vessel to provide a safe working place for members of its crew. What does it matter which one or how many of the negligent conditions caused the injury . . . Under these circumstances the maintenance of an open hatch with no lifeline about it constitutes negligence which is so closely related to

the injury in this case as to impel the conclusion that it was the proximate cause of the death" (p. 226 of 150 F. 2d).

Rhetorically, need a naval architect testify on the construction of a simple railing, or easy placement of a line, where a hypothetical question must include the facts of pitching, vibration, the 31-foot hole and the absence of any illumination? The issue is simple and the answer obvious.

By incorporating the FELA, 45 USC 51 *et seq.*, into the Jones Act, the following holding by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, is pertinent:

"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (p. 506 of 352 U. S.).

In accord:

Ferguson v. Moore-McCormack Lines, Inc., supra.

In *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424, 431, 59 S. Ct. 262, this Court expressed its liberal interpretation of the Jones Act, stating that seamen were "wards of the admiralty." Accord therefore should be given to the jury's verdict on the issues submitted under the Jones Act and related unseaworthiness causes of action. See *Jacob v. City of New York*, 315 U. S. 752, 62 S. Ct. 854.

POINT II

The issue of future maintenance was properly left to the trial judge by the parties and his exercise of discretion as a fact-finder in favor of petitioner was not clearly erroneous, nor does any decision by this Court hold that "no payments should be made for future maintenance and cure". The reversal herein is part of a new approach by the Court of Appeals for the Second Circuit to debilitate the fact-finding functions of courts and juries.

It is apparent that the fabric of maritime law as it pertains to maintenance for a seaman is severely disrupted by the majority opinion. Without any basis in a definitive ruling by this Court the majority below concludes that "... the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure." The reference to Mr. Justice Jackson's opinion in *Farrell v. U. S.*, 336 U. S. 511, 69 S. Ct. 707, is inapposite to the instant facts and taken out of context.

Despite the trial Court's proper exercise of discretion in awarding future maintenance, in tandem with the heretofore respected and traditional province of trial Courts in the admission or exclusion of expert testimony, he was reversed without reference to the principle on review expressed in *McAllister v. U. S.*, *supra*. Is this not a continuation of a new approach, without sanction by this Court, expressed for non-jury cases in *Romero v. Garcia & Diaz, Inc.*, 286 F. 2d 347, whereby the Court of Appeals for the Second Circuit held that its scope of review is expansive to the extent that it may review the evidentiary basis of findings and conclusions, "Despite possible negative inferences that might have been drawn from *McAllister v.*

United States, 348 U. S. 19 (1954)" (p. 355 of 286 F. 2d)† This is consistent with the same Court's dilution of the jury's fact finding function in *Martin v. United Fruit Co.*, 272 F. 2d 347, *Fatovic v. Nederlandsch etc.*, 275 F. 2d 188 (the latter two cases on the proposition that a naval architect was required on issues of adequacy of ship's equipment related to a light and a boom); *Dagnello v. The Long Island Railroad Co.*, March 24, 1961 (not yet officially reported), — F. 2d. — (that the Court of Appeals may review an alleged excessive jury verdict despite the trial Court's denial of a motion for reduction); *Carabellese v. Naviera Aznar, S.A.*, 285 F. 2d 355 (that a jury need not be specifically instructed on pertinent principles of maritime law).

The issue on maintenance was withheld from the jury in strict compliance with the conditions expressed by the same Court in *Bartholomew v. Universe Tankships Inc.*, 279 F. 2d 911. Reversal herein is predicted, however, on an improper standard in reviewing the medical evidence. See: *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 80 S. Ct. 173.

There is no room to cite the many cases on future awards for maintenance on the reasoning expressed in Gilmore and Black, *The Law of Admiralty*, The Foundation Press, Inc., 1957, p. 268, as follows:

"The amount awarded for maintenance lies largely in the discretion of the trial judge."

When maintenance ends is a question of fact to be determined on the basis of the evidence presented. *Ziegler v. Marine Transport Line*, 78 F. Supp. 216; *Jones v. Waterman Steamship Corp.*, 155 F. 2d 992. With respect to the principle of *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525, 58 S. Ct. 651, there is recognition that future lump

sum payments can be made "*in the discretion of the Court*, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained" (pp. 531 and 532 of 303 U. S., italics supplied). That the *Calmar* decision was not meant to limit an award for future maintenance was discussed in *Moyle v. National Petroleum Transport Corp.*, 150 F. 2d 840, and also in *Loverich v. Warner Co.*, 118 F. 2d 690, by the Court of Appeals for the Third Circuit. The advantage and consistency of lump sum payments is expressed in Gilmore and Black, *The Law of Admiralty*, *supra*, on page 266 as follows:

"It follows that the seaman may bring successive suits and that a prior recovery will not bar a subsequent action. Usually of course, even in a disputed case, one trip to the courts will settle the issue for the parties, and no instance has been found of a maintenance and cure claimant actually bringing more than one action against the same employer."

This text also discusses the leading maintenance cases on pages 264 and 265 and points out that there can be a distinction where the ship's fault prompted the injury, as contrasted with a shoreside accident to a seaman on shore leave, where the maintenance items are not duplicated in the damage action, as in the instant case. Certainly a pre-existing illness or a shoreside accident to a seaman on furlough cannot be compared to the instant accident and causally related disabilities.

With respect to the period of future maintenance, a conservative estimate of three years, in *Muruaga v. United States, et al.*, 172 F. 2d 318, the Court stated as follows:

"What allowances in money for maintenance and cure in addition to hospitalization and treatment actually

furnished have been made in other cases and the time periods on which those allowances have been based are irrelevant. Each case is to be decided on its own established facts" (p. 321 of 172 F. 2d).

In accord:

Brown v. Dravo Corp., 258 F. 2d 704.

In light of the above, it is apparent that comparing petitioner's past inability to attain the maximum benefits of medical attention with what he can reasonably expect in the future, the extent of the injuries; that petitioner is still an outpatient for rehabilitation, a former alien, now an American citizen capable only of performing sedentary work beyond his training and experience as a seaman, that the award for three years was eminently fair and conservative. A further consideration, as expressed in *Gilmore and Black, supra*, is that our courts should not be congested by periodic and frequent actions for maintenance which could be readily disposed of in one determination.

CONCLUSION

On a full appreciation of the record as a whole, to set right a miscarriage of justice that will adversely affect all maritime cases, petitioner respectfully prays that a Writ of Certiorari be granted and/or that this Honorable Court summarily reverse the Court below on both or either of the causes presented herein.

Respectfully submitted,

PHILIP F. DiCOSTANZO
Attorney for Petitioner

Dated: Brooklyn, New York
July , 1961

ROBERT KLONSKY
HERMAN N. RABSON
On Petition

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Argued May 10, 1961

Decided June 9, 1961.)

Docket No. 26875

No. 385—October Term, 1960.

JAMES VICTOR SALEM,

Plaintiff-Appellee,

—v.—

UNITED STATES LINES COMPANY,

Defendant-Appellant.

Before:

FRIENDLY and SMITH, *Circuit Judges,*
and WATKINS, *District Judge.**

Appeal by defendant United States Lines Company from judgment for plaintiff in the Southern District of New York, Willis W. Ritter, *J.*, on a general jury verdict based on negligence and/or unseaworthiness and an award of future maintenance and cure by the court. Reversed and remanded.

WALTER X. CONNOR, New York City (Kirlin,
Campbell & Keating, and James P. O'Neill,
New York City, on brief), *for appellant.*

* United States District Judge for the Northern and Southern Districts of West Virginia, sitting by designation.

ROBERT KLONSKY, Brooklyn, New York (Herman N. Rabson and DiCostanzo, Klonsky & Sergi, Brooklyn, New York, on brief),
for appellee.

WATKINS, District Judge:

This is an appeal from an action wherein plaintiff-appellee sought recovery for injuries sustained while he was employed as an able bodied seaman on a vessel owned and operated by defendant-appellant. The action was based on allegations of negligence, unseaworthiness, and right of maintenance. Defendant appeals from a judgment against it totalling \$123,968.00, plus costs, made up of the following elements: (1) A general jury verdict for \$110,000.00 damages for personal injuries due to negligence and/or unseaworthiness; (2) A maintenance award by the court for \$13,968.00, including \$8,760.00 for three years future maintenance, and \$5,208.00 for past maintenance. Appeal is also taken from the order denying defendant's motion to set aside the verdict, for judgment for defendant *non obstante veredicto*, and for a new trial.

We feel this case must be reversed on two grounds: first, because of an erroneous and prejudicial instruction given by the trial judge; and second, because of a lack of evidence to support the trial judge's finding of three years future maintenance.

Appellee was an able bodied seaman on board the luxury liner S.S. United States. His principal duty on board was to act as lookout. He reported for duty at 12:00 midnight on the night of February 16, 1958, to his post in the crow's nest. The crow's nest is a lookout post located within the ship's radar tower, a hollow aluminum mast which supports the ship's radar screens. At various levels

within the radar tower, are platforms, reached by a steel ladder running from the bottom of the radar tower to the top, a distance of some sixty-five feet. The platform which led to the crow's nest was some thirty-one feet above the deck. There were five electric lights within the tower, two below the crow's nest level, one approximately at the level of the crow's nest, and two higher in the tower.

When plaintiff reported for duty at midnight, all the lights were out except the one at the crow's nest level. He left the crow's nest at 2:00 A. M. on Monday, February 16, having stood two hours of his four-hour watch, and having been relieved at this time by a fellow seaman, one Richards. The accident complained of occurred when he was returning to duty at 2:30 A. M. At that time there was still only one light burning in the tower, the one at the level of the crow's nest. Plaintiff ascended the ladder to the platform at the level of the crow's nest and stepped with his left foot from the ladder to the platform. As he was carrying over the right foot, the remaining light in the tower went out, and the area was in complete darkness. His testimony is not clear as to whether he fell in the process of bringing his right foot onto the platform, or whether the fall occurred after he had both feet on the platform. At any rate, he fell, striking his head on the ladder, and his back on the edge of the platform. He saved himself from a further fall down through the tower by holding on to the ladder rungs. He then called for help, and Richards came to his aid from the crow's nest. Richards pulled him up to a sitting position on the platform, and asked him three or four times, "Can you hold yourself until I make a phone call?" Plaintiff finally answered, "Yes, I guess so." Richards then placed plaintiff on a narrow ledge with both feet dangling into the open space, with his arm around a pipe casing. Richards left to enter the crow's nest to telephone the bridge. Plaintiff then became dizzy, called

out for help again, but was not heard, and fell for the second time, losing consciousness. He fell to a point about eight feet below the crow's nest platform, where he was rescued by men with flashlights.

The complaint contained four causes of action, based on:

1. The negligence of defendant and its employees (Jones Act, 46 U. S. C. §688).
2. Negligence on the part of Richards, in that, while attempting to rescue plaintiff, he caused plaintiff to have a second fall.
3. The unseaworthiness of the vessel.
4. Recovery for past and future maintenance.

The trial judge instructed the jury among other things that their verdict should be for the plaintiff, "if you find the defendant was negligent in failing to provide railings or other safety devices." Due exception was taken to this and other portions of the charge.

There was no evidence of any kind in the record to support the view that railings or other safety devices could feasibly be constructed, or that failure to provide them constituted negligence or made the ship unseaworthy. Plaintiff and a seaman, Richards, testified that there was no railing inside the tower at the crow's nest level of the tower. However, there was testimony that there was a radar enclosure or casing which plaintiff could hold to, and did grasp with his left hand, as he stepped onto the platform. Plaintiff also testified that there was a shelf or stiffener encircling the inside of the tower about shoulder high as plaintiff stood on the platform. The tower enclosure varied from 36 to 48 inches in width so that plaintiff could have reached each side of the wall of the tower from the platform by raising his arms. There was no expert testi-

mony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest. Should the jury, under these conditions, have been permitted to decide whether proper marine architecture required railings or other safety devices?

In two recent cases, this court has held that a jury should not be permitted to speculate on such matters in the absence of expert evidence. In *Martin v. United Fruit Co.*, 2 Cir. (1959), 272 F. 2d 347, a case involving a seaman injured aboard ship while attempting to open an air port, the plaintiff contended on appeal that the trial judge had erred in failing to present an issue to the jury. In a *per curiam* opinion, affirming judgment for defendant, at page 349, this court stated:

"Finally, we reject the plaintiff's contention that the trial court committed error in not permitting the jury to determine whether the placement of the hinge at the bottom of the deadlight was an improper method of ship construction so as to make the vessel unseaworthy. Surely this is a technical matter in which an expert knowledge of nautical architecture is required in order to form an intelligent judgment. Since no expert testimony was introduced, it was correct to exclude this matter from the jury's consideration."

The case of *Fatovic v. Nederlandsch-Ameridaansche Stoomvaart, Maastchappij*, 2 Cir. (1960), 275 F. 2d 188, involved a seaman injured when struck in the hip by a cargo boom while working as a stevedore on the S.S. Veen-dam. The trial judge charged the jury that there were five separate theories upon which the jury might find the ship unseaworthy. One of these theories was the absence of a stopping arrangement to prevent the boom's swinging

against the kingpost. This court, in reversing judgment for the plaintiff, found that there was no evidence in the record to support this theory of unseaworthiness, and, at page 190, stated:

"In any event, the question was one of nautical architecture about which jurors lack the knowledge to form an intelligent judgment in the absence of expert testimony. *Martin v. United Fruit Co.*, 2 Cir., 272 F. 2d 347. Since there was no expert testimony on the matter, it should not have been submitted to the jury."

There is another error in this case which we feel requires reversal, and that is the finding of the court as to future maintenance. The trial judge properly withheld the question of maintenance from the jury in compliance with the conditions expressed by this court in *Bartholomew v. Universe Tankships Inc.*, 2 Cir., 279 F. 2d 911. There is no dispute here as to past maintenance, the sum of \$5,208.00 being agreed upon by both parties. The trial court awarded future maintenance computed on the basis of a period of three years at \$8.00 per day. The lump sum award for future maintenance was \$8,760.00.

The only evidence pertaining to a period of future maintenance, or the duration thereof, is the testimony of two doctors. Dr. Graubard testified to the effect that, at the time of the trial, plaintiff was still disabled and not capable of any work as a seaman. Dr. Kaplan testified to the effect that the likelihood of improvement was remote, and that it may be that plaintiff would get worse and require more specific therapy. There was no evidence that plaintiff required three years future treatment. Plaintiff's doctors did not testify as to probable duration of future treatment, if any. We do not think there was sufficient evidence upon which to base a finding of a three year future maintenance period.

The two principal Supreme Court cases on the problem are *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525, and *Farrell v. United States*, 336 U. S. 511. In the *Calmar* case, the trial court had awarded a lump sum payment for maintenance to a seaman suffering from Buerger's Disease. The payment was based on the life expectancy of the seaman as the disease was confidently predicted to be incurable. The key language of the court is as follows:

"The seaman's recovery must therefore be measured in each case by the reasonable cost of the maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."

The language of the court, "immediate future" and "definitely ascertained" would militate in favor of a rather restricted area in which payments for future maintenance might properly be awarded.

The result in *Farrell* further strengthens this interpretation. There the court held that maintenance and cure payments would only be required until such time as the seaman was *cured or was found to be incurable*. (Emphasis added.) The extreme uncertainty surrounding either or both of these possibilities would appear to make any award for future maintenance improper in this case. For instance, in the instant case, there is, in addition to the possibility of plaintiff's full recovery from his back injuries, the further possibility that his not-so-latent psychotic condition might get the better of him at any time. If he became permanently insane, even if that condition were reliably linked to the accident, his maintenance payments would cease. Whatever the respective merits of a lump sum payment as

against successive law suits in the ordinary legal setting, the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure. Justice Jackson strongly hinted at this result in *Farrell*, at page 519:

"The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."

There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that three years is the period reasonably to be expected for Salem to reach maximum improvement.

Defendant makes two other points which we feel should be discussed here since this case is being remanded for a new trial:

1. A claim of absolute bar to recovery because of plaintiff's negligence.
2. The contention that defendant was not responsible for Richards' actions in attempting to rescue plaintiff.

Concerning the first point, the trial judge charged the jury that as a seaman, plaintiff does not assume the risk of an unsafe place to work and cannot be blamed for working in an unsafe place. There was no error in this instruction. *Darlington v. National Bulk Carriers, Inc.*, 2 Cir., 157 F. 2d 817. A seaman assumes no risk of employment even of obvious dangers when he acts under the orders of a superior officer. *Becker v. Waterman Steamship Corp.*, 2 Cir., 179 F. 2d 713. As to the issue of whether plaintiff should have called someone to replace the burned out light-bulbs, the jury apparently resolved it in plaintiff's favor, and it is not proper for this court to retry factual issues

where there is evidence to sustain the finding below. There is such evidence in this case.

As to point number two, we feel that Richards' employer, defendant herein, was responsible for the actions of Richards in attempting to rescue plaintiff. See Judge Soper's opinion in *Harris v. Penn. R.R. Co.*, 4 Cir., 50 F. 2d 866, 868; *Buckeye Steamship Co. v. McDougal*, 6 Cir., 200 F. 2d 558, cert. den. 345 U. S. 926, affirming 103 F. Supp. 473. Defendant cites the case of *Robinson v. Northeastern Steamship Corp.*, 228 F. 2d 679, to the effect that a seaman, voluntarily assisting another seaman in distress is not acting within the scope of his employment, unless the rescue is authorized by the employer. That case is readily distinguishable from the case at hand. In the *Robinson* case, an intoxicated seaman, returning to his vessel from shore leave, was run over by a locomotive within a customs compound adjacent to the dock. The locomotive and the customs compound were not owned or controlled by the shipowner. The court in that case was careful to limit its holding to the facts; where the accident occurred not on the ship, but on land. We do not think the law in that case applies to rescue situations occurring aboard ship where the seaman being rescued is injured while performing his duties.

We think the correct law applicable to this case to be that the shipowner owes an obligation to effect prompt and proper rescue to a seaman injured in the performance of his duties aboard ship, and that a seaman who undertakes such a rescue is acting within the scope of his employment, the employer being liable for his actions if the rescue operation is conducted negligently.

Since we have found prejudicial error in the charge to the jury, we conform to the language in *Fatovic v. Nederlandsch-Ameridaansche Stoomvaart*, *supra*:

"Since we cannot determine from the general verdict brought in by the jury whether they relied upon a proper or improper claim of unseaworthiness in reaching their decision, we must reverse the judgment and order a new trial."

The judge could have insulated the error in the charge recited by submitting special interrogatories, as is frequently done in such cases, but he chose not to do so.

In view of our conclusion that there must be a new trial, we believe it unnecessary to discuss the many other errors complained of.

Reversed and remanded for a new trial consistent with the foregoing opinion on the issues of negligence, unseaworthiness, and future maintenance. Affirmed as to past maintenance award in the sum of \$5,208.00.

SMITH, *Circuit Judge* (concurring in part and dissenting in part):

I concur in the reversal of the award for future maintenance and cure, for the reasons stated in the opinion. I also agree with the opinion on assumption of risk and responsibility for the fellow seaman's rescue attempt.

From so much of the judgment as reverses the jury award for unseaworthiness or negligence, I respectfully dissent. As the majority points out, the crow's nest was more than thirty feet above the ship's deck with access to the outdoor lookout post obtainable through an internal radar tower. The straight ladder ascending the radar tower faced 180° away from the platform leading out to the crow's nest; reaching the platform entailed the rather dangerous maneuver of transferring one foot at a time from the ladder while turning the body completely around. There was before the

jury sufficient evidence, both from oral testimony and from photographs, for it to visualize the platform on and from which plaintiff fell and to determine whether some railing or hand hold in addition to the structures present was reasonably necessary for the protection of a seaman passing from the ladder to the platform in the swaying mast.

I do not believe that either the *Martin* or the *Fatovic* case stands for the blanket proposition that any and all theories of negligence and/or unseaworthiness which might touch on the broad field of "naval architecture" may be properly submitted to a jury only if supported by expert testimony. Here the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the hand-holds furnished were sufficient to discharge the owner's duty to provide his seamen with a safe place to work. Such a determination hardly requires expert knowledge of naval architecture,¹ such as may be required to determine proper construction of deadlights, or the feasibility of a stopping arrangement to prevent a boom from swinging against a kingpost. I would approve the charge on railings or other devices and affirm the award for personal injuries and past maintenance.

1 It is somewhat difficult to conceive in what way the construction of railings on an indoor platform would not be "feasible" from the standpoint of naval architecture. If such were the case, however, it would seem more sensible to have the defendant introduce such evidence.

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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 283.

JAMES VICTOR SALEM,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

**BRIEF OF RESPONDENT UNITED STATES LINES
COMPANY IN OPPOSITION TO PETITION
FOR CERTIORARI AND ADDENDUM.**

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James Victor Salem,	
Direct	1a
Cross	5a
Recalled:	
Cross	8a

WITNESSES FOR DEFENDANT.

James D'Andrea,	
Direct	7a
Richard W. Ridington,	
Cross	10a

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 283.

JAMES VICTOR SALEM,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT UNITED STATES LINES COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

Plaintiff below petitions for review of an order of the United States Court of Appeals for the Second Circuit (June 9, 1961) reversing in part a judgment for plaintiff filed on December 9, 1960, entered on a general jury verdict after a trial before Chief Judge Willis W. Ritter, of the District Court of Utah, Tenth Circuit, and remanding for a new trial. Plaintiff's petition for a rehearing *in banc* was denied on August 7, 1961.

JURISDICTION.

Although petitioner invokes the jurisdiction of this Court on the grounds that the decision of the court below is in conflict with decisions of other Courts of Appeals and represents a departure from the accepted and usual course of judicial proceedings, petitioner's brief fails to

show any conflict of opinions or any departure from accepted judicial procedure. Petitioner's brief represents a disguised attempt to have this Court review alleged evidence and alleged findings of fact which the court below properly found to be non-existent.

QUESTIONS PRESENTED.

1. Whether the court below was correct in reversing a general jury verdict for petitioner and ordering a new trial after a trial replete with prejudicial errors against respondent. These were errors of admission and exclusion of evidence, judicial interference with, obstruction of, and carelessly disguised prejudice against, respondent, climaxed by an erroneous, confusing charge directing the jury to find against respondent on grounds, concerning which, there was absolutely no evidence in the record.

2. Whether the court below was correct in reversing the trial court's award of three years future maintenance where the record is barren of any evidence to support such an award and where the trial court completely failed to make any findings of fact as required by Rule 52 F. R. C. P. to substantiate its decision.

COUNTER-STATEMENT OF THE FACTS.

Most of the salient facts are set forth in the opinion in the court below. However, one statement, hereafter mentioned, is inaccurate. Because of the many misstatements in petitioner's brief as to the facts, it is necessary to make this counter-statement.

Briefly, petitioner testified that as "lookout" seaman he reported for duty at 12:00 midnight to his post in the

crow's-nest. 1a* The crow's-nest was located within the radar tower, a hollow aluminum mast which supported the ship's radar screens. At various levels within the radar tower there were platforms which were reached by a steel ladder which ran from the bottom of the tower to the top; a distance of some 65 feet. The platform which led to the crow's-nest was some 31 feet above the deck. There were five electric lights within the tower. Three of these served the area between the deck and the crow's-nest.

Petitioner testified that when he first reported for duty two of the lower lights were out. 1a The light at the level of the crow's-nest was burning. He said also that the two lights above the crow's-nest were out. 1a It was uncontradicted that it was petitioner's duty to report any absence of lights. It was likewise uncontradicted, indeed the petitioner admitted, that he did not report that any lights were out. 2a

Petitioner left the crow's-nest at 2:00 A. M. 2a He was relieved by seaman Richards. 2a Richards is the seaman against whom charges of negligent rescue were made. Petitioner testified that he returned to duty at 2:30 A. M. on February 16th. 3a At that time, only the light at the level of the crow's-nest was burning. 3a He ascended the ladder to the platform at the level of the crow's-nest and stepped with one foot from the ladder to the platform. As he was carrying over the second foot (right) the light at the level of the crow's-nest suddenly went out. 4a He brought his right foot safely to the platform and then advanced his left foot toward the entrance to the crow's-nest 6a which was only two paces away.** He kept his hands to his sides,

* Unbracketed references are to the respondent's addendum.

** The Court below inaccurately states that petitioner's testimony is not clear as to whether he fell in the process of bringing his right foot to the platform. 5a, 6a

although if he had extended them he could have taken hold of a shelf (or stiffener) running around the inside of the tower 6a and guided himself to the crow's-nest. There he could have telephoned the bridge for replacements of the burned out bulbs by the ship's night electrician. 7a

In a statement (Pltf's Ex. 7) given on shipboard on the day of the accident petitioner said:

"* * * When I was coming back from coffee and when I got all the way up to crow's nest level I reached with my foot from the ladder to the platform. At this instant the light went out. I was safe when I was on the platform and I knocked on the door for Richards to open it. He opened it and I tried to put one foot inside and the other one slipped and I fell down on the platform outside of the crow's nest and struck my head on a ladder rung." * * *

There was a very substantial dispute as to the nature and extent of petitioner's injuries. While petitioner's doctors said that he was permanently disabled, respondent's doctors said that petitioner was fit for duty, as did also Marine Hospital doctors. Petitioner's doctors based their opinions on petitioner's complaints that he was unable to walk without a limp and that he was unable to bend or lift. In addition to showing through its doctors that petitioner could perform all these acts, respondent produced motion pictures of the petitioner showing that he was able to walk without a limp, without the need for a cane, and could fully bend and lift. For example, the motion pictures showed petitioner striding along the street at a fast gait, bending over repairing his car and even jacking it up with a hand jack. [Deft's Ex. K]

Moreover, petitioner in applications for drivers licenses, stated that he did not have any mental or physical disabilities. 8a, 9a.

REASONS FOR DENYING THE WRIT.

Upon a cursory reading of petitioner's brief this Court will discern quickly that, while paraphrasing Rule 19(b) of the Rules of this Court in an attempt to cloak his petition with merit, petitioner fails to show that his case possesses any national significance or that the decision of the court below conflicts with decisions of other Courts of Appeals. In essence, petitioner seeks to have this Court disregard its function and review evidence and facts which the court below has carefully ruled on.

It is a well recognized principle that the certiorari jurisdiction of this Court is a power which is sparingly exercised, and then only in cases which are of grave and general importance. The history of the use of this power was clearly set forth in Justice Frankfurter's dissenting opinion in *Rogers v. Missouri Pacific R. R. Co.*, 352 U. S. 500, at pages 530-531, where he stated:

"Thereafter such [FELA] cases could be reviewed by the Supreme Court only on certiorari to 'secure uniformity of decision' between the Circuit Courts of Appeals and 'to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. . . . These remarks, of course apply also to applications for certiorari to review judgments and decrees of the highest Courts of States'. *Magnum Co. v. Coty*, 262 U. S. 159, 163-164. (See also *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251, 257-258: Certiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.')"

This Court has frequently held that it will not grant certiorari to review evidence or discuss specific facts, *United States v. Johnston*, 268 U. S. 220, 227. See also *Houston Oil Co. v. Goodrich*, 245 U. S. 440; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178. Since petitioner's brief falls squarely within the above prohibitions, this petition should be denied.

POINT I.

THE PETITION IS WITHOUT MERIT AND SHOULD BE DENIED. PETITIONER HAS FAILED TO SHOW ANY CONFLICT OF OPINIONS BETWEEN THE COURTS OF APPEALS AND HAS FAILED TO PROVE THAT THE COURT BELOW IS IN ERROR.

In the court below, respondent raised many errors committed by the trial court but the court found it unnecessary to consider all of them because only two of these errors alone were sufficient for a reversal and remanding for a new trial. If this Court should determine that the petition has sufficient merit for a writ of certiorari to issue then this Court will have to remand to the Court of Appeals for a further hearing on the many other errors raised but not considered by the court below. However, it was quite clear to the court below sitting both originally and *in banc* that a new trial was necessary so that respondent may have, at least, one fair trial. The petitioner-biased attitude displayed by the trial court left the jury no course other than to find a verdict for petitioner.

Moreover, the trial court not only failed to dismiss petitioner's case for lack of proof as to some of the claims of negligence and unseaworthiness but in its charge it added claims which petitioner did not make. Much of petitioner's

argument in this Court is based on the alleged unsafety of his place of work and on the claim that a jury could decide this issue without the evidence of qualified persons. Naturally, petitioner fails to inform this Court that in the 1½ years during which he had performed his work in this area of the ship, he never before had experienced any trouble or difficulty. Petitioner also omits informing this Court that during the 8½ years the vessel had been in service there never had been an accident on the platform of the crow's nest, 10a, although at least 6 men traversed this area 30 times a day. 11a. This is clear evidence that the place was safe.

Petitioner boldly omits any reference to the trial court's exclusion from evidence of an exact size reproduction of this entire radar tower at the level of the accident. The reproduction was excluded on motion by petitioner. There was no basis for this exclusion. Everything within the tower on the ship was included within the full scale reproduction. At an earlier trial the reproduction had been admitted in evidence.

Had the reproduction been admitted the jury could have seen for itself that handrails or other devices were not necessary.

The Court of Appeals ordered a new trial with respect to the negligence count because of error in the charge to the jury. The trial court ordered the jury to award petitioner damages "if you find the defendant was negligent in failing to provide railings or other safety devices". The Court of Appeals correctly found that there was no evidence of any kind in the record to support this charge. It was not shown that railings could feasibly be constructed or should have been installed, or for that matter that

failure to provide such railings constituted negligence or made the ship unseaworthy. Nor was there any proof that railings could have prevented the accident. On the contrary, the proof showed that petitioner made no effort to support himself by use of his hands. He could have done this merely by extending his arms to the sides of the tower where he could have held on to a ledge projecting at about the level of his shoulder. Moreover, there were other objects within reach which he could have grasped. This petitioner failed to do. Petitioner admitted that at the time of his accident his hands were at his side so, hypothetically, even if there were additional handholds to which petitioner could have grasped for support, the fact of the matter is he did not attempt to grasp anything.

Petitioner did not even maintain on the trial that there should have been "other safety devices". This was one of the prejudicial matters that the trial court inserted in the absence of any claim or proof thereof. Moreover, there was never even a suggestion as to what the "safety devices" should be.

Actually, petitioner's claim as to railings and "other safety devices" should have been dismissed for failure of proof; allowing petitioner a second chance to make this proof is more than he deserves.

The opinion of the Court of Appeals states 33a.

"Plaintiff and a seaman, Richards, testified that there was no railing inside the tower at the crow's nest level of the tower. However, there was testimony that there was a radar enclosure or casing which plaintiff could hold to, and did grasp with his left hand, as he stepped onto the platform. Plaintiff also testified that there was a shelf or stiffener encircling the inside of the tower about shoulder high as plaintiff stood on the platform. The tower

enclosure varied from 36 to 48 inches in width so that plaintiff could have reached each side of the wall of the tower from the platform by raising his arms. There was no expert testimony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest."

After posing the question to itself whether or not, under the above conditions, the jury should have been permitted to decide whether proper marine architecture required railings or other safety devices, the court below found it was error to submit this question to the jury without expert testimony. All of the reported cases say that to find liability there must be some proof of negligence. Petitioner's claim concerned ship construction and a lay jury could not determine what was or was not proper construction without some evidence to guide it. Petitioner offered none. Respondent proved that the area had always been safe.

Having found prejudicial error in the charge to the jury, the court employed the language used in *Fatovic v. Nederlandsch-Amēridaansche Stoomvaart, Maastchappij* (2 Cir. 1960), 275 F. 2d 188, 190:

"Since we cannot determine from the general verdict brought in by the jury whether they relied upon a proper or improper claim of unseaworthiness in reaching their decision, we must reverse the judgment and order a new trial."

Petitioner's claim of "fairly obvious danger" is likewise without merit. The alleged "danger", the manhole in the platform, through which the ladder passed, is necessary to admit one to the platform. As the testimony showed,

the crow's nest ladder on the SS. *United States* is safer than on other vessels where the crow's nest ladders are exposed to the elements and require seamen to ascend a straight ladder some forty feet. In contrast, the ladder on the SS. *United States* is within the tower and has 4 or 5 platforms on which a seaman can rest on his way to the crow's nest.

The opening in the crow's nest platform is only 18" by about 20" to 30". Petitioner had safely negotiated this opening and had taken a step away from the opening when his accident occurred. 6a. Had petitioner taken one more step he would have been at the door leading into the crow's nest. Thus, he was safely on the platform away from the opening and away from the "obvious danger". The access hole in the platform did not cause his accident. Having served as a lookout on the SS. *United States* for approximately 1½ years before his accident, petitioner had climbed the ladder and crossed to the crow's nest on hundreds of occasions without incident. In point of fact, since the SS. *United States* was constructed in 1952, there has been but one accident, petitioner's, on the crow's nest platform. It is well established that respondent could not be held negligent in constructing or maintaining the crow's nest platform on its vessel when respondent was unaware of any defective or dangerous condition existing therein. There had never been any accidents in this area. Certainly, this area could not be considered one of "fairly obvious danger".

"The fact that premises or appliances have been used for many years by many persons, without injury, or that no evidence was produced that any other person than the plaintiff had been injured, is a strong circumstance in disproof of negligence in the use of such premises or appliances." 1 *Shearman and Redfield on Negligence*, Section 59, at 168, Revised Edition (1941).

See also *Hubbell v. City of Yonkers*, 104 N. Y. 434, 10 N. E. 858; *DiSalvo v. Stanley-Mark Strand Corp.*, 281 N. Y. 333; *Levinowitz v. Cunard White Star*, 129 F. Supp. 555 (S. D. N. Y. 1955); *Martucci v. Brooklyn Children's Aid Soc.*, 140 F. 2d 732 (2 Cir. 1944). See also the annotations of various state court decisions in 31 A. L. R. 2nd 190.

In Point I of petitioner's brief there are many cases cited supposedly in support of petitioner's contentions but none of these cases is in point with the case at bar.

In *Zinnel v. United States Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47 (2 Cir. 1925), the plaintiff was ordered out on the ship's well deck to secure a deck load of lumber which had come loose from its lashings during a heavy storm. The lumber was loaded flush up against the ship's rail and rose above the rail. There was no guard line erected to assist plaintiff while working on top of the cargo during the heavy storm conditions. The vessel shipped heavy seas and plaintiff was washed overboard. The court held that whether the absence of a line along the port side was a failure to exercise reasonable care to furnish plaintiff with a safe place to work was a question properly for the jury. The rail which had been provided for his protection was obstructed by the lumber.

In *Kennair v. Mississippi Shipping Co., Inc.*, 197 F. 2d 605 (2 Cir. 1952) the Court of Appeals affirmed an award for plaintiff holding that when the alleged negligence of defendant was a failure to maintain a light at the top of an elevator shaft down which plaintiff had fallen or to have a location indicator on the shelter deck at which level the elevator was usually located when the ship was in port, the trial court's instructions, whether a reasonably prudent person would have had a light or some indicator and

whether the absence thereof was the proximate cause of plaintiff's fall, was a proper instruction. This condition as to elevators is true as to shore elevators.

In *Krey v. U. S.*, 123 F. 2d 1008 (2 Cir. 1941) the court held that a ship's shower was unseaworthy where the shower was equipped with a concrete floor which sloped downward as one would enter the shower while stepping over a ten inch sill. Moreover, there were wooden slippery boards, serving as a mat, which were covered by soapy water. In addition, within the shower there were no handrails or other devices by means of which a bather could catch or support himself when entering or while in the shower. Shore showers have some form of handhold.

In *Clark v. Iceland Steamship Company, Ltd.*, 6 A. D. 2d 544, 179 N. Y. S. 2d 708, (1st Department 1958), the Appellate Division reversed a verdict for the plaintiff on the grounds that there was an erroneous admission of opinion evidence and a failure to charge the jury on a material element of liability, amounting to prejudicial error. In that case, plaintiff introduced, over the appellant's objection, expert testimony to the effect that the absence of a lifeline between stowed hatch covers and the ship's rail rendered the vessel unseaworthy and was the proximate cause of plaintiff's falling from the top of the stowed hatch covers over the rail and into the water. The court stated that the resolution of the issue of unseaworthiness depended upon whether the construction of the vessel afforded adequate space for the proper stowage of the hatch covers between the hatch coamings and the ship's rail and, in addition, whether there was sufficient deck passageway for the longshoremen to pass by. Even though there was expert testimony that the absence of said lifeline

made the vessel unseaworthy, the court found that the record did not establish improper construction of the vessel.

In *Desrochers v. United States*, 105 F. 2d 919, (2 Cir. 1939) evidence was introduced that safety ropes were ordinarily employed on ships to prevent seamen from falling into open hatches and that respondent failed to install such a safety rope. The court found that respondent was negligent and that such negligence contributed to the injuries. It was uncontradicted that there was no safety rope on the left side of the bulkhead where plaintiff sustained his fall but a safety rope had been rigged through stanchions on the right side of the bulkhead.

The facts in *Campbell v. Tidewater Associated Oil Company*, 141 F. Supp. 431 (S. D. N. Y., 1956) are completely distinguishable from the facts in the case at bar. There a seaman slipped and fell while descending from a tank top to the deck, by using a cleat which was welded to the side of the tank. Since anyone using these narrow cleats to ascend or descend from the top of the tank was provided with no handrails or handholds, it was impossible for one to maintain his equilibrium. Such is not the case here. Admittedly, the ladder was safe 11a. The trial court erroneously submitted to the jury the safety of the ladder.

The cases cited on page 21 of petitioner's brief are totally irrelevant. *The Pennsylvania*, 86 U. S. 125 and *Mason v. Lynch Brothers Company*, 228 F. 2d 709, concern themselves with the burden of proof placed upon a party who has violated a statute. *Hill, Jr. v. Atlantic Navigation Company*, 218 F. 2d 654, stands for the proposition that where a place of injury is in the owner's control, and the injured employee is without fault, and the

injury would not have occurred if the party in control had exercised ordinary care, then in the absence of any explanation for the cause of a flash fire or explosion, the inference is warranted that the employee's injury was due to the negligence of the person in control.

Read v. United States, 201 F. 2d 758 (3 Cir. 1953) was an admiralty action by a carpenter employee of a subcontractor who was converting salt water ballast tanks into fresh water tanks. Recovery for the libellant's injuries, sustained when he fell into a deep tank, was upheld on the grounds that there was uncontradicted evidence of defective lighting appliances and absence of sufficient illumination in the area where libellant, who was unfamiliar with the ship, sustained his injuries.

On Page 22 of petitioner's brief, petitioner cites as a case in point *Johnson v. Griffiths S.S. Co.*, 150 F. 2d 224 (9 Cir. 1945). That the facts in that case are not similar to the ones in the instant case is quite evident when one examines the full quotation from the court's opinion, on page 226, which petitioner carefully took out of context:

"There is evidence that the vessel was anchored in an open roadstead, under blackout conditions with no lights on deck; the weather was freezing and ice and sleet were on the deck; the vessel was pitching heavily; the passageway in the forepeak was obstructed with dunnage and debris; the guard on the steampipe over which the men were required to walk was loose and shaky causing limited visibility from the leaking steam. Under these circumstances the maintenance of an open hatch with no lifeline about it constitutes negligence which is so closely related to the injury in this case as to impel the conclusion that it was the proximate cause of the death."

POINT II.

THE COURT BELOW CORRECTLY REVERSED THE TRIAL COURT'S AWARD OF THREE YEARS FUTURE MAINTENANCE WHERE THE RECORD WAS DEVOID OF ANY EVIDENCE TO SUPPORT SUCH AN AWARD AND WHERE THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AS REQUIRED BY RULE 52 F. R. C. P.

Rule 52 F. R. C. P. provides in part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *"

Without making any findings of fact or conclusions of law the trial court granted petitioner three years future maintenance with the following statement (Pet.'s brief page 12):

"It seems to me that the poor man ever since the accident in 1958 has been trying to get relief from this condition, trying to get some assistance, to get well, to get on his feet. He made a couple of attempts to go to sea, which was unsatisfactory. There is a report in the medical record that he is still not fit for duty. He has a rehabilitation program to go through. There is a long medical history here, exhaustively gone into on the trial of this case. In my view he has not reached that point where maintenance should be cut off. At this time my judgment is three years is a reasonable time within which to anticipate that he is going to need it, and I am going to allow it upon that basis, and on the basis of the \$8 a day."

The court below properly found this statement was not in compliance with Rule 52 nor was there any evidence to substantiate the award. The court commented: 35a.

“The only evidence pertaining to a period of future maintenance, or the duration thereof, is the testimony of two doctors. Dr. Graubard testified to the effect that, at the time of the trial, plaintiff was still disabled and not capable of any work as a seaman. Dr. Kaplan testified to the effect that the likelihood of improvement was remote, and that it may be that plaintiff would get worse and require more specific therapy. There was no evidence that plaintiff required three years future treatment. Plaintiff’s doctors did not testify as to probable duration of future treatment, if any. We do not think there was sufficient evidence upon which to base a finding of a three year future maintenance period.”

After discussing *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525, the court made reference to *Farrell v. United States*, 336 U. S. 511, wherein it was held that maintenance and cure payments would be required only until such time as the seaman was cured or was found to be incurable. Relating this language to the facts in the case at bar, the Court stated: 36a

“The extreme uncertainty surrounding either or both of these possibilities would appear to make any award for future maintenance improper in this case. For instance, in the instant case, there is, in addition to the possibility of plaintiff’s full recovery from his back injuries, the further possibility that his not-so-latent psychotic condition might get the better of him at any time. If he became permanently insane, even if that condition were reliably linked to the accident, his maintenance payments would cease.”

Further on in the opinion, the court commented: 36a.

“There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that

three years is the period reasonably to be expected for Salem to reach maximum improvement."

Petitioner contends the unanimous decision of the court below in reversing the award for future maintenance flies in the face of the principle enunciated by this Court in *McAllister v. U. S.*, 348 U. S. 19. The "clearly erroneous" doctrine is not applicable here for the very reason that the trial court made no findings of fact and conclusions of law thereon. In *McAllister* (an admiralty case) this Court ruled that where the district court makes findings of fact and conclusions of law they will not be reversed unless they are clearly erroneous. In the case at bar, the trial court made no findings of fact. The *McAllister* principle is not involved here.

In the absence of any evidence to sustain it, or any findings by the trial court indicating the bases for its decision, the court below was clearly correct in reversing the award for future maintenance.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE:

1. THE JUDGMENT BELOW IS NON-FINAL. A NEW TRIAL HAS BEEN ORDERED.

2. THE DECISION BELOW DOES NOT CREATE ANY NEW RULE NOR IS IT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

3. PETITIONER FAILED IN HIS PROOF BUT MAY MAKE ANOTHER ATTEMPT ON THE NEW TRIAL.

4. THE GRANTING OF THE PETITION COULD DO NO MORE THAN REMAND TO THE COURT OF APPEALS WHICH WOULD HAVE TO REVIEW THE NUMEROUS OTHER ERRORS COMMITTED BY THE TRIAL COURT.

Respectfully submitted,

WALTER X. CONNOR,
Attorney for Respondent
United States Lines Company.

JAMES P. O'NEILL,
Counsel.

ADDENDUM TO BRIEF.**Excerpts from Testimony.**

James Victor Salem, Plaintiff—Direct.

(49) What is it you want to say about the light?

The Witness: The two top lights are never on, they were never put on. The one in particular at the crow's nest, on my watch, I never see them out except at the accident. But the other two lights below this, yes. One day they blow and a couple of other days they blow. It is like this a couple of months.

Q. Before the accident? A. Before the accident, yes.

Q. When you came to work at midnight, when on February 15 it finished on February 16 it started, you relieved Terry, is that right? A. That's right.

Q. When you came to this radar tower and opened the door, what did you see with respect to the first light? Was that on or off? A. You mean from the bottom?

Q. Yes. A. No, no lights.

Q. No light there? A. No.

Q. You climbed up a little way. What did you see about the second light? A. It was still not on.

(50) Q. You got up to the crow's nest platform. Was that light on? A. Yes.

Q. That light was on at 12 o'clock? A. Yes.

Q. The two lights on top had always been on? A. No, not on. They were not on.

Q. Did you talk to Terry before he left? A. Before he left?

Q. Did you talk to him, yes or no? A. Yes, I did talk to him.

Q. In the regular course of your work do you report to him about conditions you observe in the radar tower?

A. Of course. We discussed it for five minutes.

Mr. Connor: I object to this method of trying to get hearsay evidence in.

The Court: No. He is trying to keep it out, really. He is entitled to ask him, yes or no, whether he had

James Victor Salem, Plaintiff—Direct.

any discussion with Terry in the regular course of business.

Mr. Klonsky: Terry will be a witness in this case, too, subject to cross examination.

Mr. Connor: I must object to any conversation (51) or any question which implies anything.

The Court: He is not doing that.

Mr. Connor: I would like to object to any question which implies the subject matter of hearsay conversation.

The Court: If there is anything like that, we will sustain it.

• • • • •

Q. Did you call the bridge at that time to talk about the lights you saw were out? Yes or no. A. No.

Q. You had talked to Mr. Terry before? (52) A. Yes.

Mr. Connor: I object to that. There it is again. I knew he would do it.

Mr. Klonsky: There is a reasonable inference to be drawn, your Honor, which I think should be made in this case.

Mr. Connor: That is a statement to the Jury. It is perfectly obvious what he did. It is highly improper.

The Court: We have passed that. We don't have to have any more discussion about it.

• • • • •

Q. Do I understand your coffee break came two hours later, at 2 o'clock? A. That's correct.

Q. You were relieved by Richards? A. That's right.

Q. When you left the crow's nest for your coffee break, what did you observe about the lights in the radar (53) tower? A. The same light was on, but the other four lights were off.

Q. This light that was still on is the one you talk about at the level of the platform of the crow's nest? A. That's correct.

James Victor Salem, Plaintiff—Direct.

Q. Let us talk about this light for a minute. In the part of the light that faces the crow's nest—do you follow me?

A. Which?

Q. That back part of the light that faces the crow's nest, was that covered or exposed? A. It was not exactly covered. Like if this is the light, it just covered from here to here. But still the light is shining down to the platform.

Q. In other words, to prevent the light from going into the crow's nest, the back part of the light was covered with something? A. Yes. Just only the forward.

Q. The forward part of the light would be the part that faces the crow's nest? A. Correct.

Q. That part of the light which faced the ladder (54) was open? A. That's correct.

Q. It shone down on your platform? A. Yes.

Q. That light was on when you left at 2 o'clock too? A. That's correct.

Q. You went to your coffee break. What time did you come back? A. I come back 2:30.

Q. When you came back at 2:30, what did you see about the lights then? A. It was the same thing. In fact, I was going to report it to the bridge again to remind him about fixing it.

Mr. Connor: I move to strike out what his intentions were.

The Court: That may be stricken.

Mr. Connor: I ask the Jury to disregard it.

The Court: The Jury is instructed to disregard it.

Q. Was there a telephone in the crow's nest that was connected to the bridge? A. Yes.

• • • • •

(56) Q. Before the accident, this time at 2:30 a.m. in the morning. Tell us where you were when the light went out, et cetera. A. I was climbing the ladder. You want me to start this way? It is better for me.

Q. Go ahead. A. I climbed the ladder. Then when my foot reached it, the level of the platform, then I started to

James Victor Salem, Plaintiff—Direct.

swing myself, and I put my left foot to the platform, and at the same time, when my foot is secure, then I put my left hand around the—what do you call this again?

Q. The casing. A. The casing. So I lift my right foot and tried to cross it to the platform. That's when at this moment, between the platform and that ladder, when the light come off.

(57) Q. That light on the platform level came out? A. Yes. That one at the crow's nest level.

Q. While you were still swinging over? A. With the right foot, yes.

Q. Was there any other light of any kind in this radar tower at that time? A. No, no light.

Q. No light at all? A. No.

Q. It was black? A. Yes. I get scared.

Q. Tell us what happened. A. I getting scared. Everything went black inside. I getting scared. The first thing for me to do is, I got to move away from that hole, because there was a hole behind me. I remember my face was facing forward.

Q. You mean towards the crow's nest? A. To the crow's nest, yes. So I start to move my left foot to get in the middle, my left foot, and at the same time, just about the time before I moved my right foot—I didn't even move it yet—that's when I slipped and fall there.

Q. When you fell, what part of your body hit what (58) part of the platform and what else happened? A. From my foot to the lower of my back, I was laid down on the platform, and in this open hole, my half body was in the open hole. By the time I step in and I fall down—I am lucky—I was lucky enough. When I strike my head to the rear, at the same time I grabbed this ladder and I was lucky enough to hold it. That was the only one way to save me.

Q. Let's see if we can understand you more clearly. When you slipped you went backwards? A. Yes.

Q. When you went back, you were with your back to the ladder you had just come up? A. Yes. I struck my head.

James Victor Salem, Plaintiff— Cross.

Q. Your hand was on the ladder when you released it?
 A. Not the ladder. What do you call that?

Mr. Klonsky: The casing.

The Witness: The casing.

• • • • •

(75) Q. I am talking now about the time of your accident. Do you understand that? A. Yes.

Q. I say that after the light went out, you had your both feet on the platform. A. That's correct.

Q. At that time were you facing towards the doorway to the crow's nest? A. It wasn't exactly facing to the door. Just like I told you before, I was half—what do you call this? I was half to the starboard and half to the forward, but more to the forward.

(76) Q. At that time and before you fell, did you have your hands along your sides? A. Before I fall?

Q. Yes. A. You don't make it too clear to me.

The Court: Where were your hands when you fell?

Q. Where were your hands before you fell? A. Just like this (indicating).

Q. Hanging along your sides? A. Yes.

Q. Both hands? A. Yes.

Q. You were not holding on to that radar casing? A. I already moved from it.

Q. You were not holding on to it? A. No.

Q. Then I understand the next thing you did was to take one step forward towards the crow's nest, and then that is the time that you fell? A. No. I already moved one foot before that.

Q. You already had gone one foot towards the crow's nest? A. Not to the crow's nest. To the side; to the (77) middle.

Q. To the middle? A. Yes.

James Victor Salem, Plaintiff—Cross.

Q. Was that step that you took forward towards the crow's nest? A. That's after I take the step with the left foot, and at that time I remember I was in the middle. That's the time I slipped.

Q. In the middle of the platform? A. Yes.

Q. As you stood in that position in the middle of the platform, if you had extended your hands on each side, you could have touched each side of the area or the radar tower, could you not? A. I tried to.

Q. I say you could do it. A. I could, but I don't have the time yet to grab it.

Q. I am talking about after the lights went out. A. Yes.

Q. You had your feet on the platform. A. Yes.

Q. If you had at that moment put your hands out to each side, each hand, you could have touched the radar tower? (78). A. It is dark. You got to feel it. It is completely dark. You got to feel it first.

Q. That's all right. You could feel it. A. By feeling it, of course, that takes time.

Q. All you had to do, I say, if you wanted to take hold of the sides of the radar tower would be to extend your arms away from your body; is that true? A. Which way? Even if you tried to do what you had in your mind, to hold up on top—I got something for me especially. Do you know how long this is (indicating)?

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Q. All I am trying to find out is, if you could have put your hands out, you could have touched each side (79) of the radar tower. A. I am not too sure.

Q. How wide is the radar tower at that place? A. From wall to wall? I think about four foot. I think about that.

Q. Is the radar tower widest at that place, or is it the narrowest at that place? A. The one I am talking about, starboard and port.

Q. What we call athwartship. Do you know what I mean by that? A. No.

James D'Andrea, for Defendant—Direct.

Q. My question was what did you find with respect to whether the lights were lit or not on your daily inspections.

A. The lights were burning.

Q. That includes all five? A. All five, sir.

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(112) JAMES D'ANDREA, called as a witness by the Defendant, having been first duly sworn, testified as follows:

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(113) *Direct examination by Mr. Connor:*

Q. What is your business? A. I am a marine engineer.

Q. What licenses, if any, do you hold issued by the United States Coast Guard? A. First assistant engineer-steam and third assistant-Diesel.

Q. Is that limited or unlimited license? A. Unlimited.

• • • • •
(114) Q. What is your job on the Steamship *United States*? A. I am the third assistant engineer, assistant to the chief electrician.

Q. How many electricians are there on the Steamship *United States*, or were in this voyage in February, 1958?

A. We have 12 unlicensed electricians and two of us as engineers are in the electrical department.

Q. How are the electricians divided up? Do they all stand regular watches, or how is it done? A. We have six men that stand regular watches—three in the forward end of the ship and three in the after end of the ship, on separate watches around the clock; six men on day work maintenance, and three of them are assigned primarily to just lamping up the ship on different deck levels.

Q. Will you tell us what you mean by lamping up the ship? A. Installing burned out light bulbs and replacing (115) them as such, and going around from stateroom to stateroom on all quarters of the ship and areas of the ship.

James Victor Salem, Plaintiff—Recalled—Cross.

Mr. Connor: I object to any conversation between the witness and an unidentified doctor.

Mr. Klonsky: What he said to the doctor I think is proper.

The Court: He hasn't gotten into anything that is objectionable.

Read it back.

(Record read.)

The Court: Overruled.

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(397) Q. Are you still going as an out-patient to the hospital? A. No.

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(403) Mr. Connor: In view of the time, does your Honor want me to start?

The Court: Yes. Let's see if we can finish with this man.

Mr. Connor: I don't think I can do it in ten minutes.

The Court: Maybe you can do it in 40 minutes.

Do you fell dizzy?

The Witness: No.

The Court: Are you all right?

The Witness: Yes.

The Court: If you don't feel right, let me know.

Cross examination by Mr. Connor:

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(408) Mr. Connor: There is this question. I will limit myself to the reading of one question: "Do you have any mental or physical disability. If yes, explain." There are two boxes, one for no and one for yes. Mr. Salem put an "x" in the box "no," signifying he had no mental or physical disability.

James Victor Salem, Plaintiff—Recalled—Cross.

There is a license expiring in May, 1961, which has a similar question: "Do you have any mental or physical disability? If yes, explain." And in the box "no" an "x" was placed.

You stipulate that Mr. Salem testified that he put those x's there?

Mr. Klonsky: Yes.

• • • • •
(409) Q. You operate that car with putting your right foot on the gas pedal; is that right? A. That's correct.

Q. You drive that car some distances at some time? A. That's correct.

Q. You drive that car some distances at some time? A. It depends on how I feel, but generally I drive it, yes.

Q. You have driven it at least 40 miles on one trip, haven't you? A. 20 miles each trip, yes, when I see my children.

Q. You also have driven the automobile from Newark into New York here to see your lawyer on four or five occasions? A. I don't know. Probably I do, once every two (410) months, something like that, yes.

Q. When you travelled from New Jersey to New York, you come through one of the tubes under the river, do you? A. That's correct.

Q. In addition to driving this 20 miles you speak of, do you also drive around your own neighborhood? A. That's correct.

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(415) What would you say the distance is from the forward edge of the platform where the opening is up to the crow's nest?

Mr. Klonsky: Your Honor, we stipulated on that.

The Court: I thought all the dimensions were stipulated to. We have the specifications here somewhere. There is no use trying to wring that out of this chap. You have a speech difficulty here.

Richard W. Ridington, for Defendant—Cross.

Q. During the eight and a half years that you have been an officer on the vessel, did there ever come to your knowledge an accident in the radar tower, at the level of the crow's nest?

Mr. Klonsky: In the ten years?

(158) Mr. Connor: The eight and a half years.

Mr. Klonsky: I object to that, whether anybody else had an accident. I don't believe that is material.

Mr. Connor: We have recited some cases supporting that, your Honor.

The Court: Objection overruled.

A. Outside of Salem's accident, there has been none other.

Mr. Klonsky: I press my objection and ask that it be stricken. I believe that is immaterial, because the circumstances are different. Unless he says the circumstances are the same, with all the lights out, without skidproof paint, with the vessel rolling in the sea, then it might be germane. But merely to say there is no record previously is not correct. Anything I don't have a right to ask about afterwards I don't think is fair and proper.

The Court: I don't think it is fair, and it isn't fair, and it is improper in this sense. I believe it is incompetent. Your objection to it will go to its weight.

Mr. Connor: That is all.

Cross examination by Mr. Klonsky:

(159) Q. In the eight and a half years that you had been chief officer and at times executive officer, did you ever have advices that all the lights within the radar tower had gone out at the same time? A. No, sir; outside of the night that Salem was supposed to have had his accident.

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James Victor Salem, Plaintiff—Cross.

(83) Q. Tell me this. Where on you did that stiffener come? What part of your body did it come up to? A. Where I am when I was standing on the platform?

Q. Yes. A. I was almost in the middle, right here.

Q. Where on your body, how far up on your body, did this stiffener come that I point to? A. You mean how high from my body.

Q. Yes. I think it comes up to my shoulder. I think.

Q. That is your best recollection? A. Yes.

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(84) Mr. Connor: I think so.

I think it is conceded that there was no claim made that the ladder was in any wise defective.

Mr. Klonsky: That's true.

Q. In your work on that ship you would step from that ladder about four times a day, isn't that so? A. That's correct.

Q. You would also step from the platform to the ladder another four times a day? A. From the platform to the ladder or from the ladder to the platform?

Q. From the platform to the ladder. A. That's correct.

Q. You have been doing that work and going into that area for about four or five months, anyway, hadn't (85) you? A. It was more.

Q. How much more? A. I would say close to a year.

Q. Except for vacations, you would be doing that all those times for that period of a year? A. In the vacation?

Q. Except for vacations. A. Yes.

Q. In the daytime, when you opened the door to the crow's nest, you would get the sunlight to come into that area, isn't that true? A. No.

Q. I want to be sure I understand you. You say that when the door leading into the crow's nest was opened in the daytime, that no light would come into that area? A. In the daytime?

Q. Yes. A. If the door is open?

(841)

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The Court: (Ritter, J.) Ladies and gentlemen of the jury, it now becomes my duty to tell you what the law of this case is. It is your obligation under your oath to pay strict heed to what the Court has to say and to follow that law. I am going directly to the case.

The plaintiff has filed a claim here which we call a complaint in which he has three causes of action: first, the plaintiff claims that the defendant was negligent, and the plaintiff claims that the defendant was negligent in that while the plaintiff was proceeding to his area of work in or about the radar tower on the ship the *United States*, climbing a ladder, reaching a platform, stepping across the platform, stepping across the manhole to a platform, and where he fell and was injured, the defendant was negligent in having that platform in a slippery, worn condition; and he claims that as a result of that slippery and worn condition, which he claims was negligent on the part of the defendant, that he fell, and that he suffered injuries.

The plaintiff claims the defendant was negligent in another particular. He claims that the (842) defendant was negligent in not having proper lighting at the time and at the place and under the circumstances of this accident. He claims two things there. He claims first an omission, a failure to provide any lighting, or proper and adequate lighting, and he claims, next, a commission, that is, the providing of improper or inadequate lighting, or improper and out-of-order electrical wiring and electrical fixtures.

Ladies and gentlemen of the jury, the plaintiff claims another item of negligence, and that is the plaintiff claims the defendant was negligent in failing to provide reasonably safe railings or other safety devices in or about the radar tower in question.

I am going to move to the third cause of action. You will observe in what I have said up to this moment that the

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plaintiff's claim in the first cause of action, in all three particulars to which I have referred, is concerned with the negligence of the defendant. Now I am going to move on to his third cause of action, which is not based upon negligence at all.

It isn't necessary for him to show the defendant was negligent. Indeed, as I shall tell you (843) shortly, the due diligence of the defendant does not excuse him from a breach of the obligation which the plaintiff here claims the defendant breached, and that is the obligation to provide a seaworthy ship.

A seaworthy ship, ladies and gentlemen of the jury, is not confined to the hull of the vessel—a sound ship in that sense. It applies also to the ship's appurtenances and the appliances on the ship. The plaintiff claims here in his complaint that he was injured as a result of a breach by the defendant of the obligation to provide a reasonably safe and sound vessel and appurtenances and appliances, and he claims that that failure caused his fall and his injuries, and he claims damages for those injuries.

Before I go on to the defendant's answer, I must talk to you about the second cause of action. I have spoken now about the first, which is based upon negligence in three particulars: the permitting of the platform to be worn and slippery and dangerous; second, the failure to provide railings or safety devices; and third, the failure to provide adequate lighting or any lighting at the time of the accident; and the commission or active side of that particular aspect of the case, of providing poor, inadequate and improper (844) lighting or out-of-order electrical fixtures and parts.

The third cause of action, not based on negligence at all, but based on the unseaworthiness, is a different doctrine and which I am going to talk to you about pretty soon. I don't want you to be confused about the two theories upon which the plaintiff is proceeding here.

In the first cause of action he must show that the defendant was negligent. I am going to define that for you pretty

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soon so that you know what we mean by that. In the third cause of action he doesn't need to show that the defendant was negligent at all. I am going to define unseaworthiness more particularly for you shortly. I am now attempting to open up the case to you by showing you the general outlines.

The defendant in answer to the complaint filed its answer. The defendant in its answer admits some things that are important here, and so far as they are admitted they are laid out of the case. You need not concern yourself with them. The defendant's answer admits that the defendant owned, operated, controlled, managed, equipped and manned the vessel the SS. *United States* at all times that are important in (845) this lawsuit.

The defendant also admits that the plaintiff was in the employ of the defendant as a lookout, an able seaman, at the times important in this lawsuit.

The defendant United States Lines, Incorporated, which is the owner and operator of the ship, denies that the defendant was negligent in any one and all of the particulars on which the plaintiff bases his claim, and the defendant denies that the ship was in any way unseaworthy.

The defendant goes further and alleges the accident was the sole and complete result of the plaintiff's own negligence, and particularly the defendant claims that the plaintiff was negligent is not repairing the lighting situation himself, and secondly, in not reporting the poor lighting situation of the bridge to his employer.

Ladies and gentlemen of the jury, I now want to address myself a little further to the second cause of action, which is also based upon negligence, and that deals with the seaman Richards' alleged negligence. You will recall there is a claim here, which we call the second claim of action in this case, that the seaman Richards, hearing the screams of the plaintiff after he had fallen, came out of the lookout, (846) the crow's-nest, and attempted to assist the plaintiff.

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He got him up on the edge of the manhole, sat him there, and assisted him to put his arm around some enclosure. As I understand it, the enclosure is some metal enclosure in which there are wires and conduits. This is all in the dark, because there are no lights. The plaintiff claims that Richards then said, "I want to go to the phone and make a call for help. Do you think you can hang on?"

The plaintiff in effect said, "I believe so." And Richards went out to make the call.

I want you to understand clearly the nature of the claim here. What plaintiff claims, as Mr. Klonsky explained to you with respect to Richards, is that if you find that the defendant was negligent in any one or two or three of the three particulars in the first cause of action, and if you find that that negligence was the cause, the competent producing cause, of the plaintiff falling and becoming injured, then you are entitled, ladies and gentlemen of the jury, to take into account any injury or damage that you find was occasioned by the second fall as a consequence fairly and reasonably following from the first, and to allow damages for it, whether or not you find Richards to have (847) been negligent.

Of course, if you find Richards to have been negligent in what he did or failed to do in looking after the plaintiff, then, of course, that negligence likewise is attributed to the shipowner, who is responsible for it; and if you so find, and find that the negligence caused the plaintiff to fall the second time and from that fall he sustained injuries, you should award your verdict to him on that cause of action, too, and award him damages.

Again to repeat before I go on, I am now talking, not about unseaworthiness, I am now talking not about the absolute liability of the shipowner if he fails to maintain a ship, appliances and appurtenances reasonably fit for the purpose for which they are intended; I am going to now talk to you for a little while about negligence, and that is

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the basis for liability with which we are concerned in the first cause of action and the second cause of action. After that I shall talk with you about unseaworthiness, and that we will be concerned with in the third cause of action only.

Now with respect to negligence, ladies and gentlemen of the jury, in this state of the record, which I have outlined to you by telling you what the (848) plaintiff claims and what the defendant denies, and what the defendant claims, I say to you that the plaintiff in this case, Mr. Salem, has the burden to produce evidence before you which you believe and which satisfies your minds by the fair preponderance thereof that his injuries were caused by defendant's negligence. The term "preponderance of the evidence," ladies and gentlemen, means merely the greater weight of the evidence.

This is a civil case as distinguished from a criminal case. You folks have been sitting in the court house here sometimes and you may have tried a criminal case or two. You may have heard the judge charge you in the case at hand, namely, in a criminal case, that it is your duty to examine the evidence and the State has the burden to satisfy your minds beyond a reasonable doubt. The plaintiff doesn't have that kind of burden here. The plaintiff's burden here is to produce evidence before you which satisfies your minds by a preponderance of the evidence, meaning the greater weight of the evidence.

Now I come, ladies and gentlemen, to the problem of attempting to define for you what we mean by negligence. I am speaking again only of the first (849) and second causes of action. The standard of conduct to which the defendant is held in this case is that of a reasonably prudent man. Of course, you know that the defendant is a corporation, and of course a corporation can act only through its officers, employees, agents, servants; and when I talk about reasonably prudent men, I am talking about the people who act for the corporation, because if they fail to attain to the

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standard which the law imposes upon them, they are negligent, and that negligence is imputed to the employer and the employer is responsible for it and may be called to answer in damages for it.

If the defendant, let us say, acts otherwise in the circumstances than a reasonably careful and prudent person would have acted, he is negligent. If what the defendant failed or omitted to do what a reasonably careful and prudent person would have done in similar circumstances, the defendant is negligent. If the defendant did what a reasonably careful and prudent person would not have done, the defendant is negligent. And it is for you folks to apply that standard or measure of conduct to the facts of this case.

The defendant is not liable for non-negligent (850) acts or omissions. The defendant is not an insurer. I am talking now about both, or all three causes of action, for that matter. The defendant is liable on the first and second causes of actions only if you are satisfied by a preponderance of the evidence that the defendant is negligent. The defendant is liable only if what he did or failed to do was negligent or careless within the scope of the legal standard which I pointed out to you. If the acts of officer's, employees or agents of the defendant are negligent, that negligence is imputed to the defendant corporation as a matter of law, and the corporation defendant may be held responsible for those acts or omissions.

I am going to put it to you hypothetically with respect to the first cause of action. If you should find, after deliberating in this case, that the defendant acting through such employees or officers or agents was negligent, as I have defined it to you, in permitting the metal platform to be and remain in a worn, slippery and dangerous condition, or two, if you find the defendant was negligent in failing to provide railings or other safety devices, or three, if you find the defendant was negligent or careless in failing to provide any or reasonably adequate (851) lighting, or if you find the defendant was negligent in providing danger-

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ous or inadequate lighting or electrical wiring or parts in the radar tower, and if you further find that such negligence, if any you find, was a contributing cause to plaintiff's falling and his injuries, your verdict should be for the plaintiff, and you should assess his damages. I shall tell you about the measure of damages later. I am talking only about the first cause of action now.

On the other hand, ladies and gentlemen of the jury, if you do not find the defendant negligent in one or more of the particulars claimed by the plaintiff, or if you do not find that such negligence, if any you should find, was a contributing cause of plaintiff's injuries, then your verdict should be for the defendant on the first cause of action.

On the second cause of action—and I will put it to you the same way—if you should find that plaintiff's fellow seaman Richards was negligent in placing plaintiff after he had first fallen and was injured, if you so find, in a seated position on the platform at or about the edge thereof and then left him alone and in the dark while the seaman went into the crow's nest, if you so find, and if you (852) further find that such negligence, if any, contributed to cause plaintiff to fall again, causing new injury to his person or aggravating or increasing the severity of the injuries already suffered, if any you find, your verdict should be for the plaintiff and against the defendant and assess plaintiff's damages—again about which I shall speak later. I have been speaking only of the second cause of action.

I have already told you that plaintiff makes two claims with respect to the second cause of action. If you find the negligence and the negligence caused the second fall, if you find there was a fall, and the plaintiff was further injured, or prior injuries were aggravated in any way, you may find for him. But there is another theory with respect to the second cause of action, and that is if you find for the plaintiff on the first cause of action and find the defendant negligent, then you may find on this record, if that be the state

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of your mind, that the second fall was a consequence of the first, and assess damages for the plaintiff and against the defendant such damages you may find that consequentially followed as a result of the first fall and by reason of the second fall.

On the other hand, ladies and gentlemen of (853) the jury, if you do not find the defendant negligent on the second cause of action, or that that negligence, if any you find, was the cause of plaintiff's fall and injuries, or if you do not find that there was additional injury in the fall following from the negligence, if any you find, on the first cause of action, then you should find for the defendant on the second cause of action.

Ladies and gentlemen of the jury, I move on to the third cause of action, which is based upon an entirely different principle of law. Under the maritime law there is an absolute obligation resting upon the owner to provide a seaworthy vessel and appliances, and if he defaults in the performance of that obligation, the owner is liable for any injuries caused by the breach of the obligation.

The law terms this obligation the shipowner's warranty of seaworthiness. By virtue of it, the shipowner is under a duty to furnish and maintain a ship and its appurtenances reasonably fit and suitable for their intended use. The standard is not perfection, but reasonable fitness. What I am saying is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute; but it is the (854) duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness, a vessel reasonably suitable for her intended service.

This obligation of the defendant does not at all depend upon negligence. The shipowner is not freed from liability by the mere showing of due diligence to render her seaworthy. The warranty imposes upon the shipowner, such as the defendant here, the duty to maintain a reasonably sound ship with safe and proper appliances, in good order

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and working condition, reasonably fit for their intended purpose.

Underlying this principle, ladies and gentlemen of the jury, is a humanitarian policy which is derived from history and experience in the shipping trade over many years. It is derived from and shaped to meet the hazards of a seaman's occupation under conditions of traditional discipline on ships at sea. The plaintiff here contends that the conditions referred to in his first and second causes of action made the ship or its appurtenances and appliances unseaworthy within the scope of the principle to which I have been referring. In particular, the plaintiff claims that he was caused to fall and was injured as a result (855) of the defendant's breach of its obligation to furnish a vessel or appurtenances reasonably fit for their intended use, in that, one, the defendant permitted the metal platform to be and remain in a worn, slippery and dangerous condition and not a safe place to work; in that, two, the defendant failed to provide railings or other safety devices; in that, three, the defendant failed to provide any or reasonably adequate lighting; and that, four, the defendant provided dangerous and inadequate lighting and electrical wiring and parts inside the radar tower, rendering it an unsafe place to work.

If you find, ladies and gentlemen of the jury, and I put it to you if you should find from a preponderance of the evidence, that, one, the metal platform in or about the crow's-nest was not reasonably fit for its intended use by reason of its condition, as we have referred to it, and not a safe place to work, I say if you so find, ladies and gentlemen, and if you further find that such condition was a competent producing cause of plaintiff to fall and to become injured thereby, your verdict should be for the plaintiff and you should assess his damages, as I shall indicate later. I say to you, ladies and gentlemen of the jury, (856) further, if you should find from a preponderance of the evidence that the radar tower in or about the crow's-nest was not reasonably fit for its intended use by reason of the

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defendant's failure to provide railings or other safety devices and was not a safe place to work, I say to you if you so find, and if you further find that such condition was a competent producing cause of plaintiff to fall and to become injured thereby, your verdict should be for the plaintiff and you should assess his damages. I say further to you, ladies and gentlemen of the jury, if you should find by a preponderance of the evidence that the radar tower in and about the crow's-nest, and the ladder there, too, were not reasonably fit for their intended use by reason of the defendant's failure to provide any or reasonably adequate lighting, or by reason of the defendant providing dangerous and inadequate lighting, if you so find, and if you further find that such conditions were a competent producing cause of plaintiff to fall and to become injured thereby, your verdict should be for the plaintiff and you should assess his damages.

Should you find against the plaintiff on any one cause of action or several causes of action, (857) you may nonetheless find for him on another. Of course, ladies and gentlemen of the jury, with respect to seaworthiness as well as with respect to negligence, if your findings are against the plaintiff on these various claims, your verdict should be for the defendant upon such claim as you find against the plaintiff.

Ladies and gentlemen, as a seaman, the plaintiff does not assume the risk of an unsafe place to work and cannot be blamed for working in an unsafe place. The negligence of fellow seamen or ship's officers cannot be imputed to the plaintiff, but as a matter of law is imputed to the defendant, who is responsible for the negligent acts of plaintiff's fellow crew members or ship officers, if any you should find. The negligence of any fellow seaman is not a defense, and such a negligence is computed to the shipowner.

The comparative-negligence rule applies to this case in both of its aspects. That is to say, the contributory negli-

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gence of the plaintiff, if any you should find, is not a defense either to the claims based upon negligence or the claims based upon unseaworthiness. The contributory negligence of the plaintiff is a defense to this action only if his negligence is sole and complete; that is to say, if his negligence (858) alone produced the accident and his injuries. If both were negligent, if that should be your finding, if the defendant was negligent and his negligence contributed to cause the injury, or if the ship in one of the particulars I mentioned was unseaworthy, or its appliances and appurtenances were unseaworthy, and those conditions caused the fall and the injury, and if you find that the plaintiff, too, may have been negligent in one or more of the particulars claimed by the defendant, and the plaintiff's negligence contributed in some wise to the accident and his injuries, then you just don't find for the defendant. This isn't the defense. We apply the rule of comparative negligence in these cases, and the way that operates is you find, if you reach this point, what his damages should be, what his recovery for the whole injury, assuming it to be caused by the defendant, should be, and then you reduce that proportionately to whatever extent, by whatever fraction, you think the plaintiff's negligence may have caused or contributed to cause his injury.

Ladies and gentlemen of the jury, even if a light goes out suddenly and creates darkness that the shipowner may not have yet had notice about or time (859) to correct, nonetheless there may be a breach of the warranty of unseaworthiness within the meaning of the principle upon which we are operating. The owner's duty to furnish a seaworthy ship is no less with respect to an unseaworthy commission which may be only temporary. The shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. Liability for a temporary unseaworthy condition is no different than when the condition is permanent.

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Ladies and gentlemen of the jury, I have spoken about contributory negligence on the part of the plaintiff. The plaintiff had a duty, too, to exercise reasonable care and prudence in the performance of his work for his own safety. If you find that plaintiff failed to exercise reasonable care and prudence in looking after his own safety and in failing to correct the dangerous condition, if any you find, if you find he so failed, or in failing to record it to the proper authority for correction, if you so find, and if you further find the plaintiff's negligence, if any you find, contributed to cause his injury, such contributory negligence is not a defense to the action, as I told you, unless his negligence is the sole (860) and complete cause of the accident. He is entitled to recover a sum of money based upon a deduction of what he is entitled upon his percentage of his own contribution to the accident.

Ladies and gentlemen of the jury, there are some general things about which I want to talk to you before I come to the subject of damages. As regards any dormant or pre-existing condition which did not disable the plaintiff, if you find he had any, if it was activated or brought to light by reason of trauma—and that means, as you have been told many times, injury—imposed by the defendant, then the defendant must completely respond in damage as if the plaintiff did not have this prior idiosyncrasy.

Now we come to the subject of damages, ladies and gentlemen. Damages are divided into special and general damages. It is my duty to talk to you about all these issues in this case. I have talked about the issues of liability, based first upon negligence, secondly, upon unseaworthiness. If you find for the plaintiff upon any one or more of those claims, it will be your duty to assess the plaintiff's damages. The damages are divided into special and general damages. What we mean by special damage is loss of earnings, loss (861) of earnings that has been sustained in the past, loss of earnings that is being sustained in the present, and future loss of earnings, if any you find. Spe-

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cial damages include medical obligations, out-of-pocket expenses for his doctors and medicines or hospitalizations, if any you find, and it includes not only those expenses up to date, if any you find, but also future obligations incurred and reasonably expected to be required hereafter.

General damages, ladies and gentlemen of the jury, include pain and suffering, permanency, humiliation, embarrassment, the interference with plaintiff's right to enjoy his life in a normal and reasonably pain-free manner, any loss of bodily function, if you should so find.

In considering his loss of earnings, you should take into account his past earnings, of approximately \$600 a month, as I remember the evidence, but if I misstate the evidence, it is for you ladies and gentlemen to determine that matter upon your own recollection. In any event, you should take in his prior earnings, his monthly earnings, in computing his past loss of earnings and his reasonably-expected future earnings, if any you should find.

(862) In determining any award of damages with respect to his future loss of earnings, you may consider the United States Life Tables, sometimes called the Mortality Tables, sometimes called the Actuarial Tables, published by the National Office of Vital Statistics. Those tables say that a white male, 37 to 38 years of age, at the time of this accident, had an average remaining lifetime of 33.86 years.

Ladies and gentlemen of the jury, you are the sole judges of the evidence in this case, the sole judges of the facts, and the sole judges of the credibility of the witnesses here. By credibility of the witnesses, I mean it is for you to determine whom you will believe and what you will believe. It is for you to determine where the ultimate truth in this case lies, because there is a conflict in the evidence.

Ladies and gentlemen of the jury, when I examined you on your oath at the beginning of this trial, I charged you it would be your obligation to decide this case on the evidence

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and on no other matter. Of course, I charged you, too, as I have now, that you must pay attention to what the Court says about the law. I say to you, ladies and gentlemen of the jury, the evidence in this case is the exhibits, and it is also (863) the testimony of the witnesses who have been sworn, examined and cross-examined before you here, and it is your duty to decide the case on that evidence. You are the sole judges of it. I have been charging you. Counsel addressed you in summation. Counsel addressed you at the beginning of the trial. We have all had something to say during the course of the trial. I want to say to you that nothing that counsel has said to you and nothing that the Court has said to you is evidence. You are obliged to follow what the Court has to say about the law.

The Court is entitled to comment upon this evidence, if I want to. I can take each one of these causes of action and tell you what I think about it. At the same time I should be obliged to tell you that no matter what I thought about it, it is for you and for you alone to decide what you think the evidence shows and to reach your own conclusion. I don't think it is necessary in these cases for the Court to comment on the evidence, so I don't do it. But I want to say to you if the Court said anything, or if counsel, either, said anything during the course of this trial, it is your privilege to disregard it, so far as it refers to the evidence of the facts. You may not disregard what (864) the Court has said about the law.

Ladies and gentlemen of the jury, when you retire to deliberate upon your verdict, heed well the instructions. Take as much time as you want. We will send the exhibits in with you. If there is any help we can give you, please feel free to communicate with me and we will try to assist you in any way that we can. Don't be in a hurry about this. You can proceed in your own way. You should examine this evidence carefully, thoroughly, deliberate upon it, without any bias or prejudice of any kind, way, shape, matter

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had within him seeds that came out. I never made any such statement.

He said on several occasions that I wanted the Jury to throw the plaintiff in the street. I think that is a most unfair statement about what I said, and I think it is an appeal to passion and prejudice and highly prejudicial to the defendant. I think the Jury should be instructed that there was no such contention.

(868) The Court: I think I gave a pretty strong instruction on that. That was intended for the benefit and to the detriment of both of you.

Mr. Connor: I take that position, your Honor.

The Court: You take any position you want. You make your record. I have been doing this quite a while, too.

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(872) Mr. Connor: I except to so much of your Honor's charge in that you said in words or substance that the Jury can find the defendant negligent or the vessel unseaworthy because of defective wiring on the ground that there was no such evidence in the case upon which the Jury could make such determination.

I also except to that part of your Honor's charge—and you repeated this on a number of occasions, what I have just mentioned and what I am going to say now—that the defendant could be found negligent or the ship unseaworthy on proof that the electrical fixtures and other appliances were not fit, or that they were negligently furnished.

I also except to that part of your Honor's charge in which you said in words or substance that the Jury might find the defendant negligent or the ship to be unseaworthy for failure to furnish railings or handrails.

I except to so much of your Honor's charge in which you said in words or substance that the defendant would be charged with any negligence on the part of Richards in attempting to effect a rescue.

(873) Your Honor charged the Jury that the plaintiff could not be blamed for working in an unsafe place. I ex-

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cept to that because it is not complete. If the place where the plaintiff was working was unsafe by reason of his own negligence, then he can be charged with it.

The Court in charging the burden of proof I believe limited the consideration of burden of proof to considerations of unseaworthiness or negligence, whereas the same measure of proof was not required as to the damages. In other words, I don't think your Honor made clear to the Jury that in considering whether or not the plaintiff is entitled to damages, his proof must be by a fair preponderance of the credible evidence, and also, of course, as to the extent of any damages.

With respect to whether your Honor wants me to name these, I except to your Honor's failure to charge the last sentence in my request to charge, number one, dealing with the situation where if the evidence was evenly balanced and the plaintiff could not recover and that the defendant would be entitled to a verdict.

I don't think it was made clear to the Jury that in connection with the claim of negligence the only requirement on the part of the defendant was to exercise reasonable care to furnish a reasonably safe place and (874) reasonably safe appliances. I except, therefore, to your Honor's failure to charge with respect to number *three*.

Your Honor indicated that you would in substance charge number *five* and number *six*, and I except to that.

Also, you said you would charge in substance number *seven*, *eight* and *nine*, none of which I submit your Honor has charged, and therefore I take exception.

Your Honor failed to charge number *ten* and said you would not charge. I except to that.

I except to your Honor's failure to charge number *sixteen*.

In respect of charges requested by the defendant, number *twenty-four*, which deals with the way the Jury should view Richards' conduct, your Honor said you would give it in substance, and I don't recall that it was, and therefore I except.

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Your Honor said you would not charge number *twenty-five*, and I except to that.

I had asked your Honor to charge in respect of the elements of damage and the fact that certain motions had been denied. In other words, I asked your Honor to charge the Jury the fact that you mentioned elements of injury to the Jury should not be regarded as (875) an indication that you had any feeling about the matter one way or the other.

The Court: I told them. Didn't I tell them if I mentioned it it was my duty to do it along with all the other issues in the case? I did.

Mr. Connor: I may have missed it.

The Court: I had that in mind. Maybe so.

Mr. Connor: The same in respect to the denial of various motions.

The Court: I never say anything about that.

Mr. Connor: I must add here, your Honor, that I was quite concerned with respect to the number of times in which your Honor mentioned the elements upon which plaintiff claimed the right to recover damages. I didn't keep any record of it, of course, but it seems to me that the numerous repetition of those charges is prejudicial to the defendant as indicating a view on your Honor's part that these charges had substance and should be accepted by the Jury.

The Court: I certainly had no intention of doing that. But what is done is done. I felt it is a little complicated—and it was for me. Three causes of action itself is not complicated, but there were three parts to the first cause of action, the two views of the (876) plaintiff about his second cause of action, and then unseaworthiness based upon the first and second causes of action and conditions therein existing, if any they found and I was trying to make it crystal clear to the Jury what it is we were expecting them to address themselves to and to accomplish. Be that as it may, of course, you have your exceptions.

Colloquy.

Since you raised the question of the burden of proof, I think I will charge them with that in the morning. I won't charge them now because it is too late.

You said I didn't address myself in the charge on the burden of proof on the subject of damages.

Mr. Connor: That's right.

The Court: I don't want to have anything wrong with the charge on a simple thing like that. While I am doing it, I will say the burden is on the defendant to produce evidence which the Jury believes and which satisfies their minds by a preponderance thereof, that there was contributory negligence in the case. I will do it more artfully, of course.

Mr. Connor: I dislike the term "contributory negligence," because it implies by its very terms that the defendant also was negligent. May I suggest to your Honor that when you do give that charge, instead of (877) labeling the contributory negligence, you label it plaintiff's negligence?

The Court: I have already referred to it as contributory negligence. I think I will do it in terms I have already charged.

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(885) The Court: I called you back to say two or three small things to you before you commence your (886) deliberations.

In the first place, as I talked with you, I told you there were three causes of action in this case. I may have emphasized that so strongly that you may be under the impression that you are to say something in your verdict about each one of those causes of action. That is not true. All that is necessary is that you bring in a general verdict, if that is the state of your mind in this case; that is, a verdict for the defendant, if that be the state of your mind, or a verdict for the plaintiff, if that be the state of your mind, and assess the plaintiff's damage.

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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 385—October Term, 1960.

(Argued May 10, 1961

Decided June 9, 1961.)

Docket No. 26875

JAMES VICTOR SALEM,

Plaintiff-Appellee,

v.

UNITED STATES LINES COMPANY,

Defendant-Appellant.

Before:

**FRIENDLY and SMITH, Circuit Judges,
and WATKINS, District Judge.***

Appeal by defendant United States Lines Company from judgment for plaintiff in the Southern District of New York, Willis W. Ritter, *J.*, on a general jury verdict based on negligence and/or unseaworthiness and an award of future maintenance and cure by the court. Reversed and remanded.

WALTER X. CONNOR, New York City (KIRLIN, CAMPBELL & KEATING, and JAMES P. O'NEILL, New York City, on brief), for appellant.

* United States District Judge for the Northern and Southern Districts of West Virginia, sitting by designation.

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ROBERT KLONSKY, Brooklyn, New York (HERMAN N. RABSON and DiCOSTANZO, KLONSKY & SERGI, Brooklyn, New York, on brief); *for appellee.*

WATKINS, District Judge:

This is an appeal from an action wherein plaintiff-appellee sought recovery for injuries sustained while he was employed as an able bodied seaman on a vessel owned and operated by defendant-appellant. The action was based on allegations of negligence, unseaworthiness, and right of maintenance. Defendant appeals from a judgment against it totalling \$123,968.00, plus costs, made up of the following elements: (1) A general jury verdict for \$110,000.00 damages for personal injuries due to negligence and/or unseaworthiness; (2) A maintenance award by the court for \$13,968.00, including \$8,760.00 for three years future maintenance, and \$5,208.00 for past maintenance. Appeal is also taken from the order denying defendant's motion to set aside the verdict, for judgment for defendant *non obstante veredicto*, and for a new trial.

We feel this case must be reversed on two grounds: first, because of an erroneous and prejudicial instruction given by the trial judge; and second, because of a lack of evidence to support the trial judge's finding of three years future maintenance.

Appellee was an able bodied seaman on board the luxury liner S.S. *United States*. His principal duty on board was to act as lookout. He reported for duty at 12:00 midnight on the night of February 16, 1958, to his post in the crow's nest. The crow's nest is a lookout post located within the ship's radar tower, a hollow aluminum mast which supports the ship's radar screens. At various levels within the radar tower, are platforms, reached by a steel ladder running from the bottom of the radar tower to the top, a distance of some sixty-five feet. The platform which

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led to the crow's nest was some thirty-one feet above the deck. There were five electric lights within the tower, two below the crow's nest level, one approximately at the level of the crow's nest, and two higher in the tower.

When plaintiff reported for duty at midnight, all the lights were out except the one at the crow's nest level. He left the crow's nest at 2:00 A. M. on Monday, February 16, having stood two hours of his four-hour watch, and having been relieved at this time by a fellow seaman, one Richards. The accident complained of occurred when he was returning to duty at 2:30 A. M. At that time there was still only one light burning in the tower, the one at the level of the crow's nest. Plaintiff ascended the ladder to the platform at the level of the crow's nest and stepped with his left foot from the ladder to the platform. As he was carrying over the right foot, the remaining light in the tower went out, and the area was in complete darkness. His testimony is not clear as to whether he fell in the process of bringing his right foot onto the platform, or whether the fall occurred after he had both feet on the platform. At any rate, he fell, striking his head on the ladder, and his back on the edge of the platform. He saved himself from a further fall down through the tower by holding on to the ladder rungs. He then called for help, and Richards came to his aid from the crow's nest. Richards pulled him up to a sitting position on the platform, and asked him three or four times, "Can you hold yourself until I make a phone call?" Plaintiff finally answered, "Yes, I guess so." Richards then placed plaintiff on a narrow ledge with both feet dangling into the open space, with his arm around a pipe casing. Richards left to enter the crow's nest to telephone the bridge. Plaintiff then became dizzy, called out for help again, but was not heard, and fell for the second time, losing consciousness. He fell to a point about eight feet below the crow's nest platform, where he was rescued by men with flashlights.

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The complaint contained four causes of action, based on:

1. The negligence of defendant and its employees (Jones Act, 46 U. S. C. §688).
2. Negligence on the part of Richards, in that, while attempting to rescue plaintiff, he caused plaintiff to have a second fall.
3. The unseaworthiness of the vessel.
4. Recovery for past and future maintenance.

The trial judge instructed the jury among other things that their verdict should be for the plaintiff, "if you find the defendant was negligent in failing to provide railings or other safety devices." Due exception was taken to this and other portions of the charge.

There was no evidence of any kind in the record to support the view that railings or other safety devices could feasibly be constructed, or that failure to provide them constituted negligence or made the ship unseaworthy. Plaintiff and a seaman, Richards, testified that there was no railing inside the tower at the crow's nest level of the tower. However, there was testimony that there was a radar enclosure or casing which plaintiff could hold to, and did grasp with his left hand, as he stepped onto the platform. Plaintiff also testified that there was a shelf or stiffener encircling the inside of the tower about shoulder high as plaintiff stood on the platform. The tower enclosure varied from 36 to 48 inches in width so that plaintiff could have reached each side of the wall of the tower from the platform by raising his arms. There was no expert testimony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest. Should the jury, under these conditions, have been permitted to decide whether proper marine architecture required railings or other safety devices?

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In two recent cases, this court has held that a jury should not be permitted to speculate on such matters in the absence of expert evidence. In *Martin v. United Fruit Co.*, 2 Cir. (1959), 272 F. 2d 347, a case involving a seaman injured aboard ship while attempting to open an air port, the plaintiff contended on appeal that the trial judge had erred in failing to present an issue to the jury. In a *per curiam* opinion, affirming judgment for defendant, at page 349, this court stated:

"Finally, we reject the plaintiff's contention that the trial court committed error in not permitting the jury to determine whether the placement of the hinge at the bottom of the deadlight was an improper method of ship construction so as to make the vessel unseaworthy. Surely this is a technical matter in which an expert knowledge of nautical architecture is required in order to form an intelligent judgment. Since no expert testimony was introduced, it was correct to exclude this matter from the jury's consideration."

The case of *Fatoric v. Nederlandsch-Amerikaansche Stoomvaart, Maatschappij*, 2 Cir. (1960), 275 F. 2d 188, involved a seaman injured when struck in the hip by a cargo boom while working as a stevedore on the SS. *Veen-dam*. The trial judge charged the jury that there were five separate theories upon which the jury might find the ship unseaworthy. One of these theories was the absence of a stopping arrangement to prevent the boom's swinging against the kingpost. This court, in reversing judgment for the plaintiff, found that there was no evidence in the record to support this theory of unseaworthiness, and, at page 190, stated:

"In any event, the question was one of nautical architecture about which jurors lack the knowledge to form an intelligent judgment in the absence of expert testimony. *Martin v. United Fruit Co.*, 2 Cir., 272 F. 2d

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347. Since there was no expert testimony on the matter, it should not have been submitted to the jury."

There is another error in this case which we feel requires reversal, and that is the finding of the court as to future maintenance. The trial judge properly withheld the question of maintenance from the jury in compliance with the conditions expressed by this court in *Bartholomew v. Universe Tankships Inc.*, 2 Cir., 279 F. 2d 911. There is no dispute here as to past maintenance, the sum of \$5,208.00 being agreed upon by both parties. The trial court awarded future maintenance computed on the basis of a period of three years at \$8.00 per day. The lump sum award for future maintenance was \$8,760.00.

The only evidence pertaining to a period of future maintenance, or the duration thereof, is the testimony of two doctors. Dr. Graubard testified to the effect that, at the time of the trial, plaintiff was still disabled and not capable of any work as a seaman. Dr. Kaplan testified to the effect that the likelihood of improvement was remote, and that it may be that plaintiff would get worse and require more specific therapy. There was no evidence that plaintiff required three years future treatment. Plaintiff's doctors did not testify as to probable duration of future treatment, if any. We do not think there was sufficient evidence upon which to base a finding of a three year future maintenance period.

The two principal Supreme Court cases on the problem are *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525, and *Farrell v. United States*, 363 U. S. 511. In the *Calmar* case, the trial court had awarded a lump sum payment for maintenance to a seaman suffering from Buerger's Disease. The payment was based on the life expectancy of the seaman as the disease was confidently predicted to be incurable. The key language of the court is as follows:

"The seaman's recovery must therefore be measured in each case by the reasonable cost of the maintenance and cure to which he is entitled at the time

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of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."

The language of the court, "immediate future" and "definitely ascertained" would militate in favor of a rather restricted area in which payments for future maintenance might properly be awarded.

The result in *Farrell* further strengthens this interpretation. There the court held that maintenance and cure payments would only be required until such time as the seaman was *cured or was found to be incurable*. (Emphasis added.) The extreme uncertainty surrounding either or both of these possibilities would appear to make any award for future maintenance improper in this case. For instance, in the instant case, there is, in addition to the possibility of plaintiff's full recovery from his back injuries, the further possibility that his not-so-latent psychotic condition might get the better of him at any time. If he became permanently insane, even if that condition were reliably linked to the accident, his maintenance payments would cease. Whatever the respective merits of a lump sum payment as against successive law suits in the ordinary legal setting, the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure. Justice Jackson strongly hinted at this result in *Farrell*, at page 519:

"The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."

There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that three years is the period reasonably to be expected for Salem to reach maximum improvement.

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Defendant makes two other points which we feel should be discussed here since this case is being remanded for a new trial:

1. A claim of absolute bar to recovery because of plaintiff's negligence.

2. The contention that defendant was not responsible for Richards' actions in attempting to rescue plaintiff.

Concerning the first point, the trial judge charged the jury that as a seaman, plaintiff does not assume the risk of an unsafe place to work and cannot be blamed for working in an unsafe place. There was no error in this instruction. *Darlington v. National Bulk Carriers, Inc.*, 2 Cir., 157 F. 2d 817. A seaman assumes no risk of employment even of obvious dangers when he acts under the orders of a superior officer. *Becker v. Waterman Steamship Corp.*, 2 Cir., 179 F. 2d 713. As to the issue of whether plaintiff should have called someone to replace the burned out light-bulbs, the jury apparently resolved it in plaintiff's favor, and it is not proper for this court to retry factual issues where there is evidence to sustain the finding below. There is such evidence in this case.

As to point number two, we feel that Richards' employer, defendant herein, was responsible for the actions of Richards in attempting to rescue plaintiff. See Judge Soper's opinion in *Harris v. Penn. R.R. Co.*, 4 Cir., 50 F. 2d 866, 868; *Buckeye Steamship Co. v. McDougal*, 6 Cir., 200 F. 2d 558, cert. den. 345 U. S. 926, affirming 103 F. Supp. 473. Defendant cites the case of *Robinson v. Northeastern Steamship Corp.*, 228 F. 2d 679, to the effect that a seaman, voluntarily assisting another seaman in distress is not acting within the scope of his employment, unless the rescue is authorized by the employer. That case is readily distinguishable from the case at hand. In the *Robinson* case, an intoxicated seaman, returning to his vessel from shore leave, was run over by a locomotive within a customs compound adjacent to the dock. The locomotive and the customs compound

Opinion of U. S. Court of Appeals, Second Circuit.

were not owned or controlled by the shipowner. The court in that case was careful to limit its holding to the facts; where the accident occurred not on the ship, but on land. We do not think the law in that case applies to rescue situations occurring aboard ship where the seaman being rescued is injured while performing his duties.

We think the correct law applicable to this case to be that the shipowner owes an obligation to effect prompt and proper rescue to a seaman injured in the performance of his duties aboard ship, and that a seaman who undertakes such a rescue is acting within the scope of his employment, the employer being liable for his actions if the rescue operation is conducted negligently.

Since we have found prejudicial error in the charge to the jury, we conform to the language in *Fatoric v. Nederlandsch-Amerikaansche Stoomvaart, supra*:

“Since we cannot determine from the general verdict brought in by the jury whether they relied upon a proper or improper claim of unseaworthiness in reaching their decision, we must reverse the judgment and order a new trial.”

The judge could have insulated the error in the charge recited by submitting special interrogatories, as is frequently done in such cases, but he chose not to do so.

In view of our conclusion that there must be a new trial, we believe it unnecessary to discuss the many other errors complained of.

Reversed and remanded for a new trial consistent with the foregoing opinion on the issues of negligence, unseaworthiness, and future maintenance. Affirmed as to past maintenance award in the sum of \$5,208.00.

SMITH, Circuit Judge (concurring in part and dissenting in part):

I concur in the reversal of the award for future maintenance and cure, for the reasons stated in the opinion. I also agree with the opinion on assumption of risk and responsibility for the fellow seaman's rescue attempt.

Opinion of U. S. Court of Appeals, Second Circuit.

From so much of the judgment as reverses the jury award for unseaworthiness or negligence, I respectfully dissent. As the majority points out, the crow's nest was more than thirty feet above the ship's deck with access to the outdoor lookout post obtainable through an internal radar tower. The straight ladder ascending the radar tower faced 180° away from the platform leading out to the crow's nest; reaching the platform entailed the rather dangerous maneuver of transferring one foot at a time from the ladder while turning the body completely around. There was before the jury sufficient evidence, both from oral testimony and from photographs, for it to visualize the platform on and from which plaintiff fell and to determine whether some railing or handhold in addition to the structures present was reasonably necessary for the protection of a seaman passing from the ladder to the platform in the swaying mast.

I do not believe that either the *Martin* or the *Fatovic* case stands for the blanket proposition that any and all theories of negligence and/or unseaworthiness which might touch on the broad field of "naval architecture" may be properly submitted to a jury only if supported by expert testimony. Here the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the handholds furnished were sufficient to discharge the owner's duty to provide his seamen with a safe place to work. Such a determination hardly requires expert knowledge of naval architecture,¹ such as may be required to determine proper construction of deadlights, or the feasibility of a stopping arrangement to prevent a boom from swinging against a kingpost. I would approve the charge on railings or other devices and affirm the award for personal injuries and past maintenance.

¹ It is somewhat difficult to conceive in what way the construction of railings on an indoor platform would not be "feasible" from the standpoint of naval architecture. If such were the case, however, it would seem more sensible to have the defendant introduce such evidence.

Order Denying Petition for Rehearing in Banc.**UNITED STATES COURT OF APPEALS****FOR THE SECOND CIRCUIT.**

JAMES VICTOR SALEM,
Plaintiff-Appellee,

v.

UNITED STATES LINES COMPANY,
Defendant-Appellant.

On Petition for Rehearing In Banc.

HERMAN N. RABSON and DiCOSTANZO, KLONSKY & SERGI,
Brooklyn, N. Y., for plaintiff-appellee.

The petition for rehearing in banc is denied, Judge Clark and Judge Smith dissenting.

Judge Waterman votes to deny with the following statement:

An examination of the whole record convinces me that the full retrial ordered by the panel majority is desirable. However, with Judge Smith "I do not believe that either the *Martin* or the *Fatovic* case stands for the blanket proposition that any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a Jury only if supported by expert testimony."; and I find no reversible error in the failure at the former trial to so charge the jury.

J. EDWARD LUMBARD

Chief Judge

August 7, 1961

SEP 15 1961

JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On Reply Brief

Supreme Court of the United States

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

Preliminary Statement

After the instant petition with the certified record on the proceedings in the Court of Appeals was filed in this Court on August 3, 1961, unexpectedly on August 7, 1961 an order was filed by the Court of Appeals denying a petition for rehearing *in banc*. This followed a prior order of June 21, 1961, simply denying a petition for hearing by the initial panel in which Judge Smith again recorded his dissent. The additional order of August 7, 1961, including a short memorandum by Judge Waterman, is reproduced on page 40a of respondent's addendum to its brief in opposition.

It is now apparent that the presently constituted bench of six circuit judges is evenly divided three to three on the major issue in the petition. Judges Clark, Waterman and Smith find no reversible error in the instruction by Ritter, *Ch. J.* on "railings or other safety devices" without expert

testimony. Judge Waterman would remand for other unexpressed reasons, and is the only one of the bench who has so affirmatively indicated. The other three, Judges Lumbard, Moore and Friendly denied the petition, to thereby affirm the 2 to 1 decision below.

POINT I

Intracircuit conflict and the finality expressed by the Court below to deny a seaman future maintenance demonstrate that certiorari jurisdiction is indicated.

The existence of such an intracircuit conflict has previously moved the Supreme Court to grant certiorari, thereby bringing about uniformity within the circuit. See: *John Hancock Ins. Co. v. Bartels*, 308 U. S. 180, 60 S. Ct. 221; *Dickinson v. Petroleum Conversion Corp.*, 338 U. S. 507, 70 S. Ct. 322. The purpose and intent of Rule 20 of the Rules of the Supreme Court would be properly served by granting certiorari to resolve this clear cut and significant incompatibility. Mr. Justice Frankfurter's dissenting opinion in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 530-531, 77 S. Ct. 443, quoted on page 5 of respondent's brief, actually favors petitioner in both respects where it states that certiorari jurisdiction is exercised on matters of general importance, "or in order to secure uniformity of decision."

The future trial and appellate status of petitioner's cause, as well as all other seamen's actions in the Second Circuit, is uncertain on the blanket proposition that "any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a Jury only if supported by expert testimony." This means any case involving ship or naval architecture now requires the testimony of an expert

on even a simple question of fact that is not complex or mechanical, well within the ken of a jury. A subsidiary question is whether an expert should be called by a plaintiff, or the shipowner whose responsibility it may be to show that something is not feasible.

Should petitioner's cause be remanded without a definitive holding by this learned Court, he and the trial Court can only guess whether or not an expert witness on this simple question of fact is required. Affirmance or reversal of either course must depend on which of the conflicting Circuit Court Judges would be in the next majority.

One of the other legal issues at stake, however, concerning future maintenance, is apparently treated with finality in the opinion below where it states "... the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (p. 8a of appendix to petitioner's brief). This is palpably contrary to all definitive rulings by this learned Court, and yet if undisturbed, must bind the trial Court in the instant case and adversely affect all seamen's cases grounded on this historic right. Respondent's silence on this in its brief is significant. Though this cause is meaninglessly remanded, yet its finality is apparent and therefore sufficient in itself to prompt a writ of certiorari. Respectfully, this is an issue of imperative importance within the intent and meaning of Rule 20.

The trial Court recorded its reasons for granting petitioner three years future maintenance, based not only on the medical testimony by petitioner's doctors and the admissions by medical experts called by respondent, but also on the dramatic findings in the ship's medical log that had been inexplicably withheld from medical analysis by respondent's Drs. Balensweig and Hyslop, and the voluminous records of the U. S. Public Health Service

Hospital constituting several years of treatment, and rehabilitation to the future. Though the humane and proper finding and conclusion on future maintenance were oral and concise, they nonetheless comply with Rule 52 F. R. C. P. where an exact form is not prescribed. (See p. 12 of petitioner's main brief.)

Not only does the majority opinion below demonstrate an adverse attitude to the traditional count for maintenance, it is part and parcel of a philosophy hostile to that reflected in the Jones Act (46 U. S. C. 688), and the related Federal Employers' Liability Act (45 U. S. C. 51 *et seq.*). See: *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413; *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409; *Layender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740; *Myers v. Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334; *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457, and the other cases cited in petitioner's main brief. This is suggested as another persuasive ground for granting petitioner's prayer.

Where respondent states there is no conflict between the decision below and decisions of other Courts of Appeals, it apparently overlooks references in petitioner's main brief collated in the index of cases. Respondent's brief is silent on the more important conflict between the decision below and decisions of this learned Court that have consistently favored seamen as wards of the Court, entitled to a respected right to trial by jury.

POINT II

Respondent's unfair references to the record in the light of the jury's verdict in petitioner's favor, and the abuse it heaps on the eminently fair trial judge, must not cover the truth that a summary reversal by this Honorable Court would be fair and dispositive of issues of imperative public importance.

The futility of respondent's position explains and is matched by its abuse of the trial Judge. A unanimous jury on concededly substantial evidence found for petitioner, not the unfairly accused "petitioner-biased" trial Court. Respondent's brief is an example of desperate advocacy which attempts to distract from the overwhelming proof that favored petitioner and so found by the triers of facts, by again presenting its rejected version of its defenseless multiple breaches of the non-delegable obligations owed a young American seaman who was thereby rendered permanently and totally incapable of returning to a gainful occupation at sea. Respondent pursues the course it accuses by asking this learned Court to review evidence and facts, which it concedes on page 5 of its brief the Court of Appeals "has carefully ruled on." The jury's findings on conceded substantial evidence should have been binding on the Court below, and so by indirection respondent raises another point to justify review on the pre-emption of a Constitutional jury's fact-finding function in a seaman's case.

By reference to some of respondent's specious arguments it is readily apparent that a summary reversal is indicated on the proposition that there can be no doubt of the ship-owner's breach of its high duty of care irrespective of due diligence or notice.

1. The record is replete with proof of the need for and absence of: a railing or "other safety devices", such as an ordinary rope line to grasp instead of the inadequate substitutes in the bulky radar cable enclosure or the thin metal stiffeners projecting from the sides of the tower; or skid proof paint on the worn platform, as to which respondent had given false answers to interrogatories; or a simple flashlight to compensate for the long known inadequacy of the lighting in the radar tower. A railing or guard line would undoubtedly have afforded petitioner an immediate hand hold and also a guard to prevent his fall into the unprotected man-sized opening under the foreseeable dangers of a darkened radar tower, vibrating excessively in a pitching and rolling vessel proceeding at its record speed in a winter sea. Can a reasonable man deny there were conditions of "fairly obvious danger"?

2. Though attempted by respondent, can a crow's nest in an enclosed tower without any lights, compounded by long prior knowledge that the lighting therein was deficient, be compared favorably with outside crow's nests on other vessels? That there had been no prior accidents is some proof for the jury to accept or reject. Here it was rejected on the particular facts and circumstances involved in the accident—the condition of complete absence of illumination being a singular factor that respondent's witnesses conceded. On this obvious contributing cause that had never occurred before, but was chronic and so foreseeable for the cause on Jones Act negligence, and must prompt liability irrespective of notice on the cause for unseaworthiness, there should be no factual issue remaining for another jury.

3. Respondent concludes that the "granting of the petition could do no more than remand to the Court of Appeals

which would have to review the numerous other errors committed by the Trial Court." A study of respondent's brief discloses that a principal contention on "other errors", not even alluded to in the opinion below, is that the trial Court exercised its discretion to exclude a wooden mock-up model of a cut away portion of the radar tower, deceptive and confusing as to the actual conditions facing petitioner when he fell. It was no substitute for respondent's own photographs and diagrams that were actually admitted into evidence. Respondent also points to the number of rulings against it, to improperly argue they constituted "carelessly disguised prejudice against" respondent. Respondent fails to demonstrate that these vague "other errors" have any substance.

Regardless, the legal issues are of such importance and a definitive ruling by this learned Court is so imperative to resolve the intracircuit conflict, that the possibility of further proceedings on other matters before the Court of Appeals should not stay the granting of the petition, or in the alternative, a summary reversal on the ground that a disposition on "other errors" is meaningless with a record so clearly in favor of petitioner.

A case in point is *Palermo v. Luckenbach Steamship Co., Inc.*, 246 F. 2d 557, rev'd 355 U. S. 20, 78 S. Ct. 1. There another panel of the same Court of Appeals for the Second Circuit had reversed a judgment based on a jury verdict, on a purported failure to instruct, and other contended errors not considered in the opinion of reversal. This 2 to 1 reversal by the Court of Appeals, with a dissenting opinion by then Chief Judge Clark (who also dissents in the instant case), was summarily reversed by this learned Court. Thereafter the Court of Appeals at 253 F. 2d 724 rejected the shipowner's motion for additional argument on a reserved contention of error and reinstated the original judgment.

CONCLUSION

For the additional reason of a clear cut intracircuit conflict that will frustrate and prejudice any subsequent proceeding in this and all future trials on maritime causes, which can only be resolved by granting the petition for a writ of certiorari; and further, on an appreciation of the record as a whole that clearly and convincingly supports petitioner's contention that the conceded facts and findings justify a summary reversal and reinstatement of the original judgment based on the jury's verdict, and the trial Court's finding for future maintenance, petitioner respectfully prays that a writ of certiorari be granted and/or that this Honorable Court summarily reverse the Court below on both or either of the causes presented herein.

Respectfully submitted,

PHILIP F. DiCOSTANZO
Attorney for Petitioner

ROBERT KLONSKY and
HERMAN N. RAESON
On Reply Brief

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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POINT I—

To reverse a general jury verdict in a seaman's case because an expert was not called to temper the jury's fact finding function where the compounded danger of an unprotected hole was "fairly obvious" and within a lay juror's experience and ken, is contrary to all decisional authorities on similar issues, and in disregard of this Court's clear and consistent mandate on the inviolable constitutional function of a Jones Act jury 24

POINT II—

Uniform principles of general maritime law, heretofore expressed by this Court, are severely disrupted where the majority below would impose a novel burden on a seaman to prove in addition to an unsafe place to work and/or unseaworthiness, that the shipowner could have "feasibly" corrected its breaches of an absolute duty 35

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

There was no formal opinion by the trial Judge, W. W. Ritter, *D.J.*, in the United States District Court for the Southern District of New York. The opinion of the Court of Appeals for the Second Circuit, with a dissenting opinion by Smith, *C.J.*, is reported at 293 F. 2d 121 (R. 199). The first denial of a petition for rehearing on June 21, 1961 by Watkins, *D.J.*, and Friendly, *C.J.*, with Smith, *C.J.* again recording his dissent, is not officially reported (R. 210). After the instant petition was filed on August 3, 1961, an order was entered on August 7, 1961 by the Court of Appeals denying a petition for rehearing *en banc*, incorporating a memorandum by Waterman, *C.J.*, reported at 293 F. 2d 126 (R. 211).

Jurisdiction

Judgment was entered in the United States Court of Appeals for the Second Circuit on June 9, 1961, and a petition for rehearing *en banc* was denied on August 7, 1961. The instant petition was timely filed on August 3, 1961 and was granted on October 9, 1961. Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. 1254 (1) and 2101, as well as Rules 19(b) and 20 of the Rules of this Court. The Jones Act (46 U. S. C. 688) was the basis for federal jurisdiction in the Court of first instance.

Statute and Constitutional Provision Involved

The Jones Act, 46 U. S. C. 688, as follows:

"Recovery for injury to or death of seaman: Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

Constitution of the United States; Seventh Amendment:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury,

shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Questions Presented

1. Should a general verdict for a seaman by a jury in a Jones Act case be set aside by the Court of Appeals because of the absence of testimony by an expert on naval architecture, with respect to a simple issue of obvious danger, not involving any complex or technical details beyond the ken of a lay juror?

2. Is testimony by an expert on naval architecture with respect to the need for, or the feasibility of construction of a railing or safety device, necessary to support an instruction to the jury that a verdict for the plaintiff might follow "If you find the defendant was negligent in failing to provide railings or other safety devices," related to a platform adjacent to a man-sized opening, 31 feet up in a swaying radar tower, completely enclosed and in absolute darkness, where substantial testimony by officers and crew members, supplemented by photographs and diagrams, clearly demonstrated the negligent absence and need of a railing or guard line?

3. Where the trial Court by consent of the parties passed on the cause for future maintenance and determined from the voluminous medical evidence that petitioner was deserving of an award for three additional years, stating his reasons therefor in the record, was this "clearly erroneous" and defective in form and reversal otherwise justified on a ground expressed in the majority opinion that "... the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure"?

Statement of the Case

Petitioner had been employed aboard the SS United States since September 1956, first as an ordinary seaman and then shortly thereafter as a Lookout A/B. His competence as a good worker, and the absence of any complaint, illness or injury prior to the instant accident are unquestioned. Since the accident on February 16, 1958, and by reason thereof, he is permanently not fit for duty as a seaman and is still undergoing rehabilitation.

Petitioner's causes of action for unseaworthiness, negligence, and maintenance in the past and for the reasonably foreseeable future were grounded on the following items of fault, fully supported by references to the record hereinafter:

1. That the crow's nest platform on which he had to step from the ladder and walk to his station was smooth, partly worn away and without any hand-holds, railings or life-lines, while the vessel was coursing a winter sea with excessive vibration, pitching and rolling, transposed particularly to the 65-foot high radar tower near the bow.

2. The crow's nest platform within the radar tower was not painted with any skid-proof material. Respondent's answers to interrogatories that it was so painted were shown to be untrue by the testimony of its own Bos'n.

3. The unseaworthy condition of the five lights in the fully enclosed radar tower had long existed, particularly the absence of any illumination from the upper two lights that would have cast light on the crow's nest platform below them. These upper two lights had been out for at least two voyages, and the complaints and inadequacy of the sockets and bulbs were known to responsible crew members

and officers for a substantial time prior to February 16, 1958.

The two bulbs below the crow's nest platform were also unlit and had been the subjects of attempted but unsuccessful repair several days before. The relationship of the remaining light to the accident at the crow's nest platform, which was shown to be smooth and worn, without any railing or life-line, is described in the majority opinion, as follows:

"Plaintiff ascended the ladder to the platform at the level of the crow's nest and stepped with his left foot from the ladder to the platform. As he was carrying over the right foot, the remaining light in the tower went out, and the area was in complete darkness. His testimony is not clear as to whether he fell in the process of bringing his right foot onto the platform, or whether the fall occurred after he had both feet on the platform. At any rate, he fell, striking his head on the ladder, and his back on the edge of the platform" (R. 201).

4. The negligence of the relief A/B Lookout Richards, acting in the course of his employment for the respondent, is clearly grounded in his own testimony and that of the petitioner. Though Salem's second fall for a distance of 8 feet was consequential on the unseaworthiness of the platform and the lights, there was absent any request by respondent for special interrogatories to delineate the findings by the jury. The record clearly shows that despite the inability of the seriously disabled and dazed petitioner to respond to several requests by Richards as to whether he could be left alone, he was placed on a narrow ledge with both feet dangling into the open space of 30 feet, with his arm around an aluminum smooth and cumbersome pipe

casing, wherefrom he fell again after Richards left to enter the crow's nest proper to telephone the bridge. This telephone could have been reached by Richards while remaining on the platform and close to Salem to heed his second cry for help and hold him on the precarious perch to which he had been placed by Richards.

The majority below concedes this alone would have supported the judgment for petitioner had there been a special finding. Because there was no request for special interrogatories the Court and parties relied on a general verdict. The majority reversed the general verdict, though conceding it was amply supported by proof of negligent rescue and on the issue of inadequate illumination, as follows:

"As to the issue of whether plaintiff should have called someone to replace the burned out light-bulbs, the jury apparently resolved it in plaintiff's favor, and it is not proper for this court to retry factual issues where there is evidence to sustain the finding below. There is such evidence in this case" (R. 206).

Hereinafter we concisely set forth the factual picture with specific references to the record, as they relate to the questions presented for review:

1. *The dangerous and unseaworthy condition of the crow's nest platform:* At the time of the accident the log entries indicate the vessel was rolling and pitching easily in a rough west northwesterly sea with a moderate average northwesterly swell, seven degrees portside and six degrees starboard side, the weather overcast with passing rain squalls (R. 148). The vessel was subject to a great degree of vibration, which the chief quartermaster admitted adversely affected the wiring in the tower (R. 152, 153). Respondent's witness Richards testified that there were no per-

forations on the crow's nest platform, that it was smooth and partly worn away (R. 159, 161). There was absent any handholds, rails or lifelines at that level (R. 160). Salem's testimony as to the smooth and slippery condition of the unpainted platform, the absence of handholds, and that the pipe casings were too big and cumbersome to grab when coming onto the platform from the ladder, were corroborative of Richard's testimony (R. 16, 17). His prior experiences required him always to be very careful when stepping from the up and down ladder onto the platform (R. 31, 32).

Respondent had previously given untrue answers to supplemental interrogatories propounded by petitioner by stating that slip-proof paint had been applied to the platform on December 23, 1957 by members of the crew, a product of "National Slip-Proof." Respondent's witness, Bos'n McGhee, unequivocally testified that only aluminum paint, not skid-proof, had been previously applied (R. 157). There was no proof produced by defendant to the contrary. The photographs of the platform taken by respondent six months after the accident (R. 149, 150) depicted skid-proof paint that did not pertain on February 16, 1958. The Bos'n's record of painting inside the radar tower related "just aluminum paint" (R. 47, 48). The platform was subject to condensation or "sweat" because of the differences in temperature inside and outside the tower (R. 187).

The deposition of Trendell Terry sets forth the need for a railing or similar device at the crow's nest platform. When he testified he was still employed by respondent, having served with it since 1950 (R. 217), and with the experience of 160 to 186 voyages on the S.S. United States, as a Lookout A/B, having used the ladder and platform in question about 88 times each voyage. On page 92 he refers to the smooth and slippery condition of the platform, with-

out any non-skid paint, and further "There certainly should have been a railing or life lines on this platform to grab" (R. 218). He described the large and cumbersome pipe casing as the only handhold available, in the following words:

"...but it's not very convenient because it's so big and round, big and bulky, that you couldn't get a good grip . . . I never use it" (R. 217).

Terry also confirmed the absence of any life line, its purpose meant to be a "safety measure to grab hold onto to protect yourself until you're safe" (R. 217).

Similarly did Louis Tribble, the other A/B lookout testify on the absence of a necessary safety device. By deposition (Pl. Ex. 18, R. 214), he recited his extensive marine background, including a rating as a second mate (R. 214). With respect to the rectangular pipe casing referred to in the majority opinion below, he testified he never used it as a handhold for the following reasons:

"A. Well, because I don't ever grab hold of anything that has electrical current going through, plus the fact that it was too big to grab hold of" (R. 215).

He also affirmed there was nothing on the platform "to grab hold of or to bridge over the space" (R. 215).

Richards also testified that there was absent any handholds, rails or lifelines at the crow's nest level, corroborating Salem who testified that the pipe casings were too big and cumbersome to grab when coming onto the platform from the ladder.

2. *The dangerous and unseaworthy condition of the lights within the radar tower:* Petitioner had not seen the two upper lights illuminated for approximately five

months prior to the accident (R. 14, 19), and Richards testified that the two lights had not been lit for at least two voyages, including the voyage of February 16, 1958 (R. 158, 159). It was also Richards' testimony that if the upper lights had been on they would have illuminated the crow's nest platform (R. 159). Respondent's attempt to prove that all lights had previously been on cannot be justified by any reference to the testimony, as chief officer Ridington testified that he knew that the accident occurred with all the lights out (R. 51), and in fact the assistant to the chief electrician D'Andrea, replaced but three of the five light bulbs in the tower immediately after the accident (R. 155), which points to the continuing disregard for the upper illumination that would have reflected down to the crow's nest platform.

Where respondent seeks to charge Salem with an obligation to obtain and replace lights, the testimony of respondent's witness, second electrician Rivas, is noted that no one but himself was supposed to put in bulbs and that he did not supply any bulbs to the crew (R. 155). Petitioner testified that only on one prior occasion had he ever replaced a bulb (R. 149) and before the accident there were no spare bulbs available (R. 183). He recalled that on prior occasions, every time, lights were out (R. 149). Chief quartermaster Barton stated that he had previously noted and reported trouble with the radar tower lights to the ship's electrician, "some time in the middle of February in 1958", more specifically six days before the accident. Then he informed the chief electrician that three bulbs had burned out (R. 34, 35).

Third assistant engineer D'Andrea testified that he assigned the second electrician Rivas to check "what might be causing lamps to burn out" (R. 39), but he himself did not inspect the work done (R. 153). D'Andrea affirmed that

household bulbs were used, not anti-vibration or "rough service bulbs" (R. 153) and that the vessel carried twelve unlicensed electricians and two engineers in the electrical department (R. 37), "as lamps are burned out, these men are primarily assigned to lamping up the ship" (R. 37), to replace 500 to 600 burned out bulbs a day on an average voyage of 11 to 12 or 15 to 16 days (R. 38). This is related to colloquy by respondent's attorney who attempted a distinction when one didn't exist, as follows:

"Most of us are familiar with bulbs burning out in a home and I want to show the difference between a ship bulb and a home bulb" (R. 37, 38).

There was no difference as the bulbs used were of "Normal household quality—Mazda lamps, General Electric" (R. 39).

The prior written statement to respondent by the second electrician Rivas, that he renewed two sockets on February 10, 1958, omits reference to checking from February 10th to February 16th, despite knowledge of the frequent blow-outs of the radar tower bulbs (R. 156). The statement admits that " * * * the two bottom lights were burning out too often" and though he was sufficiently suspicious of the lower two sockets and replaced them, he could not find that the replacements made any difference (R. 44, 45). He admitted that the chief quartermaster advised him "The two bottom lights were going off and on too often" but his inspections of the lighting conditions in the radar tower were done only twice each trip (R. 44). It was petitioner's testimony that he had previously noted much trouble with the bottom lights, though immediately before the accident the light at the crow's nest level was on. He affirmed that it was the sole job of the electricians to work on wiring and the lights (R. 15, 21), and that the two lights above, never

on, would have shone down on the crow's nest platform (R. 19). At the time petitioner came to his watch at 12 midnight, when he noted that only the crow's nest light was on (R. 20), he discussed the absence of light with Terry, whom he relieved (R. 20, 21).

3. *The accident, Richards' negligent attempt at rescue and the conditions related thereto:* Salem testified that while in the process of moving his right foot over onto the platform from the up and down ladder, the sole remaining light went out and "I get scared" (R. 22, 23). He slipped and fell backwards, striking the ladder with his head, saving himself by grabbing the rungs, while his lower back struck the platform to prompt excruciating lumbar pain (R. 23, 24). Petitioner had slipped just after he had released his hold on the casing, a means used by him to swing over from the ladder, and both hands were then at his side, as he hadn't time to extend his arms to reach the sides of the radar tower (R. 26, 27, 28). He screamed, and Richards came out feeling for him, grabbed his hand and sat him down on the edge of the platform (R. 24, 25). Salem stated that Richards talked to him several times, about three or four, while he was dizzy, and asked "Can you hold yourself" and he finally answered "Yes, I guess so" (R. 25). When Richards left, Salem became more dizzy, called out "Richard, Richard, please, I am getting weak, I can't hold myself longer, I am getting weak, I am getting weak" and then he fell some distance below (R. 25). He testified that he had been left by Richards, after being seated by him on a narrow ledge with both feet dangling into the 30 feet open hole (R. 25).

It was Richards' testimony that he heard a noise, opened the door and observed complete darkness (R. 158); that Salem did not knock on the door to the crow's nest, in contradiction to the statement obtained from petitioner while

he was under gross sedation in the ship's hospital and incapable of clearly expressing what had occurred (R. 150, 151, 159, 164). Richards affirmed that he had asked Salem three times if he could leave to make the call, that Salem kept complaining of back pain and finally said "All right" (R. 160). Petitioner's painful reaction when his leg was touched prompted Richards to pull him in by his arm (R. 55). With respect to moving petitioner to a more safe position, Richards testified " * * * I didn't want to move him from that place, to move him in a safe position * * *," because Salem was in pain and wouldn't allow himself to be touched, and " * * * I was afraid to touch him, and at the same time I preferred to leave him where he was" (R. 57). In Court, as a witness for the respondent, Richards testified that he had left Salem with both feet on the platform, not dangling, and after he remained there "a few minutes or so * * *," then went into the crow's nest (R. 57, 58). In a prior written statement given by Richards to petitioner's counsel, he had stated a contradictory version that "He was sitting aft of the cable line with body facing portside and his legs laying over the edge of the platform, in open space" (R. 161, 162).

Though the telephone was only two feet from the door (R. 56) and there is a stipulation by counsel for respondent that "I agree that the door does not cover over the telephone" (R. 52), Richards nonetheless went inside the crow's nest and abandoned Salem. After he heard him scream for help again, Richards ran out and felt that he was no longer on the platform. He returned and called for the third officer Gregware, then on duty, who came with a flashlight and they both visualized Salem hanging about eight feet below the crow's nest platform (R. 56)). It is significant that Richards admitted he could have reached the telephone while still on the platform and near the

petitioner (R. 160), which is corroborated by Terry (R. 189). He had never been issued a flashlight (R. 159) and once illumination was obtained from Gregware, he helped pull the injured seaman up again to the level of the crow's nest (R. 56).

Gregware testified there was no light in the radar tower when he came to the scene (R. 163), that he first waited for Richards to grab Salem and then he ascended (R. 163). In a prior written statement given to the respondent, he stated that he observed Salem in a state of shock and delirious (R. 163, 164). The condition of the lights right after the accident was affirmed by D'Andrea who stated he went to the tower and saw that all the lights were out (R. 164), and flashlights were being used to light the interior (R. 155).

4. *Petitioner's injuries, hospitalizations, medical testimony on diagnosis and prognosis:* The 37-year-old petitioner had joined the S.S. United States in September, 1956 as an ordinary seaman. Thereafter he was soon promoted to the responsible capacity of Lookout A/B (R. 149). His several pre-voyage physical examinations while in respondent's employ were unremarkable (R. 148, 149), and there was no entry produced from any medical log or surgeon's journal of an illness, complaint or injury to Salem prior to February 16, 1958. His boatswain McGhee affirmed that his work was satisfactory and he got along well with the other seamen (R. 157), on which Terry stated that before the accident petitioner was "very relaxed all the time" (R. 189). His annual earnings were \$5,656.76 (R. 181), a loss of over \$15,000 to the time of trial.

The terror and trauma of the instant accident produced such profound physical and psychiatric changes that he is permanently unemployable as a seaman and in need of

extensive orthopedic and psychiatric treatment and rehabilitation. In concise chronological order we shall hereinafter discuss this aspect of the case and relate it to respondent's contentions that were unacceptable to the jury.

(a) On the ship there was fully recorded the extensive complaints, findings and treatments rendered for the crucial two days following the accident and before the ship docked to allow petitioner to be removed to the U.S.P.H.S. Hospital by ambulance for years of subsequent inpatient and outpatient treatment. The ship's hospital record was never sent to the successor hospital to permit a continuing knowledge of symptoms and allow a diagnosis based on the full medical history. Instead, a comparatively short and incomplete letter was sent by a Dr. Fenger, the ship's doctor, which is not referred to in any of the volumes of subsequent hospitalization, and cannot compare with the actual ship's medical entries made the first two days. Dr. Fenger was not produced as a witness and neither of respondent's medical experts was afforded the opportunity to see the ship's medical log, except Dr. Hyslop who first saw it long after his examination and report, on the morning he was to testify (R. 184, 193). This proof of withholding the ship's medical log from the successor hospital and respondent's own medical experts was related to the weight of their diagnoses and testimony, not to any issue of failure to treat.

The ship's personal injury report recites the following injuries:

"Probable fracture or dislocation of vertebra with spinal nerve injury. Paralysis and anesthesia right leg. Concussion of brain. Sedation, bilateral traction of both legs; hospitalized 16 through 18 of February, '58" (R. 148).

Third officer Gregware who helped rescue petitioner had stated that Salem seemed in shock, "just like delirious there", and that the slightest touch seemed painful (R. 163, 164).^{*} Richards' testimony on that is referred to *supra*, and petitioner also testified as to excruciating pain, screaming with movements of the vessel, numbness in his right leg, given many injections to allay pain, immobilized by traction weights and given "fluid from a bottle * * * in the arm" (R. 150, 164).

All this is corroborated and supplemented by the medical log itself. Therein exhaustively is recorded that Salem had no sensation on urination, with almost complete nerve paralysis in the right leg, able only slightly to move his right great toe, immobilized in Trendelenberg traction, 15 pounds for each leg, a rise in blood pressure, confused at times and administered intravenously 5% Q.W. and many analgesics when "screaming with pain caused by ship's rolling," an irregular pulse and observed to have "very dark areas around nose and eyes" (R. 54, 169, 170, 176, 179).

(b) At the U. S. Public Health Service Hospital, Stapleton, S. I., Salem arrived by ambulance, tied down in a stretcher, admitted while in a confused mental state (R. 165, 173).

Traction was reapplied and Salem was confined to bed for approximately one and a half months this first time (R. 165). His many periods of inpatient and outpatient treatments, with the exception of a few weeks when he unsuccessfully attempted to return to sea, are chronologically recited in the record (R. 165, 166, 167).

We can only refer to some of the hospital findings, as space does not permit a comprehensive review of the many diagnoses and prognoses made in the orthopedic and neuro-

psychiatric departments of the hospital. There is noted a "weakness right leg probably due to nerve root irritation, L-5" (R. 193), myofascial disease and a "chronic schizophrenic reaction, undifferentiated type, conversion reaction, spondylolysis L-5, with first degree spondylololsthesis" (R. 170). There is also noted a record of paralysis of the small intestine in the area of the lumbar spine, technically called a reflex ileus (R. 173), as well as positive Lasegue tests (R. 180). A September 16, 1960 entry sets forth—"do not believe that this patient will ever be fit for sea duty when back condition and N.P. situation considered together" (R. 185); and there are also hospital notations of Salem frothing at the mouth and losing consciousness (R. 170); that he had a seizure and was confused, "eyes appear blurred, rolling about, not focusing * * * attack of screaming", subject to fears, head and back aches, sleeplessness (R. 172). During the period of his treatment petitioner was furnished three braces for continuous use, to wear for immobilization of his back, wearing one at the time of trial while still in pain (R. 181, 182). The diagnosis of November 16, 1960 sets forth that he was not fit for duty orthopedically and was to return on December 16, 1960 (R. 167), the latter date subsequent to the trial's end.

(c) The testimony by all the medical experts favor petitioner. Neither Dr. Hyslop nor Dr. Balensweig were able to state for respondent that Salem is without disability (R. 185, 193, 196). On a hypothetical question posed to Dr. Balensweig, exclusive of his examination but based on the record, assuming the facts that were not afforded him with respect to the initial ship's hospital record (R. 193, 194, 195), he testified that "On the hypothetical question that you have propounded I would say he is not fit for duty" (R. 196). Dr. Balensweig's examination dis-

closed positive findings, including muscle spasm that can be related to nerve root involvement (R. 195); Dr. Hyslop, though he contested the judgment of the impartial medical examiners at the Public Health Service Hospital as "istrogenic responsibility" (R. 184, 185), did so in a report made without the benefit of the ship's hospital records before him (R. 184).

It was the conclusion of Dr. Graubard, a traumatic surgeon, and Dr. Kaplan, a neuropsychiatrist, that petitioner was permanently disabled, never again able to return to sea, and suffering from the effects of a herniated intervertebral disc and a severe mental condition, traumatically caused.

Dr. Graubard's positive findings and conclusions are as follows: That on the occasion of his examination he noted a flattened lower back, restriction in lateral bending to 20%, atrophy of the right thigh of $1\frac{1}{2}$ inch as compared to the opposite member, a positive jugular compression test (R. 168), nerve damage, and in reference to the absence of sensation of urinating aboard the vessel it was his testimony that this showed "a great relationship between injuries to the spinal cord, especially in the lumbar area, and urinary disturbances. It is very frequent and very common" (R. 169). The inability to move his right great toe aboard the vessel was indicative of nerve interruption, particularly the sciatic nerve (R. 169, 170), and an asymptomatic congenital back condition was more prone to this trauma (R. 171), thereby prompting a diagnosis of a herniated disc superimposed upon a congenital defect known as spondylolysthesis (R. 171). It was his conclusion that with respect to the back condition alone Salem would not ever be "capable of returning to work as a seaman at all", expressed with a reasonable degree of medical certainty (R. 172).

Dr. Kaplan testified that the psychiatric complaints could be more disabling than the physical injury itself (R. 174), and on his examination he examined the hospital records as well as the patient, and noted that the pain described approximated the fifth lumbar nerve root in the radiation distribution (R. 175). He also found bilaterally positive Laségue signs (R. 175). On the first examination performed July 7, 1958, Dr. Kaplan did not have the ship's hospital records, but they were available to him for the second examination on October 18, 1960 (R. 174, 175). At the time of his first examination Dr. Kaplan concluded the patient had a nerve root irritation at the fifth lumbar and first sacral nerve root levels, probably due to a herniation of a disc, as well as a conversion hysteria or a hysterical reaction, and that this condition was susceptible to further exacerbation (R. 175, 176). The reflex ileus due to back trauma, recorded in the hospital records, was described as a reflex response to irritation of nerve roots which enervate or supply the small bowel and is consistent with trauma sufficient to cause a herniated disc at the L-5 level (R. 176, 177). When petitioner's counsel attempted to examine the doctor with respect to the past family history, this was precluded by reason of the Court's prior admonition during an off-the-record discussion, to which Mr. Connor did not comment to show that he wished this prior history as part of the case (R. 177, 178). With respect to the finding of chronic schizophrenia, he described it as a psychotic illness related to a severe post-traumatic neurotic reaction which bordered on or actually was psychotic while he was in the hospital (R. 178). He concluded from his second examination that Salem had a severe conversion hysterical reaction, "undoubtedly part of a schizophrenic reaction * * * and that this was apparently precipitated by the accident in February of 1958. I noted also that he still had complaints and findings indicating that there was per-

sistent nerve root irritation" (R. 178). His prognosis was that because of the long duration of disability the likelihood of improvement was remote and that it may be that petitioner would get worse and require more specific orthopedic or neurosurgical therapy (R. 179). This is compared with the September 16, 1960 hospital notation that his congenital condition on which the trauma was imposed makes Salem an "impossible candidate for any surgical treatment" (R. 185, 186).

With respect to past maintenance there was an agreement between counsel as to how much had previously been paid, and deducting that from the total owed at \$8 a day the figure of \$5,208 was arrived at. Future maintenance in the amount of \$8,760 for a three year period was granted, and the following reasons by the Court are recorded.

"The Court: It seems to me that the poor man ever since the accident in 1958 has been trying to get relief from this condition, trying to get some assistance, to get well, to get on his feet. He made a couple of attempts to go to sea, which was unsatisfactory. There is a report in the medical record that he is still not fit for duty. He has a rehabilitation program to go through. There is a long medical history here, exhaustively gone into on the trial of this case. In my view he has not reached that point where maintenance should be cut off. At this time my judgment is three years is a reasonable time within which to anticipate that he is going to need it, and I am going to allow it upon that basis, and on the basis of the \$8 a day" (R. 139).

This was reversed and remanded by the Court below on the following:

"Whatever the respective merits of a lump sum payment as against successive law suits in the ordinary legal setting, the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (R. 205).

Summary of the Argument

The majority opinion erroneously predicates reversal of a jury verdict in favor of a Jones Act seaman for maritime negligence and/or unseaworthiness on the basis of a disjunctive, either arm of which is without support in the record and presents an obvious invasion of the jury's province to decide a simple question of fact, not complex or technical, pertaining to ordinary standards of conduct of safety and danger. It states that the trial Judge gave an "erroneous and prejudicial instruction" (R. 200) that their verdict should be for the seaman "if you find the defendant was negligent in failing to provide railings or other safety devices" (R. 202), on the alternate grounds that "There was no evidence of any kind in the record to support the view that railings or other safety devices could feasibly be constructed, or that failure to provide them constituted negligence or made the ship unseaworthy" (p. 123 of 293 F. 2d, R. 202).

The issue is drawn on the first alternative by Judge Smith's dissenting opinion wherein is stated that an expert on naval architecture should not testify where "Here the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the handholds furnished were sufficient to discharge the owner's duty to provide his seamen with a safe place to work" (p. 126 of 293 F. 2d, R. 208). In the order on the petition for rehearing *en banc*, Judge Smith is joined by Judges Clark and Waterman. Judge Smith adds in a footnote com-

ment that it could not be conceived how the construction of a railing on an indoor platform would not be "feasible", but as such contention is made by the majority "... it would seem more sensible to have the defendant introduce such evidence" (R. 208). Parenthetically, the record is bare of any contention made by respondent at trial that it was not "feasible" to construct a railing or other safety device around the deep and man-sized opening which petitioner had to span from a dangerously awkward position on the ladder.

As to the second arm of the disjunctive reasoning for reversal, that failure to provide a railing or other safety device was not supported by evidence to show that "failure to provide them constituted negligence or made the ship unseaworthy", the record is replete with proof to the contrary.

Instead of applying decisional precedents as to the shipowner's absolute and non-delegable obligation to provide safe and seaworthy appurtenances and appliances, the majority below applied a different standard of whether "... proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest" (R. 202).

The majority has overlooked the ample testimony for petitioner on the lack of and need for a protective railing, or a guide rope or similar simple device, related to a platform adjacent to a man-sized opening, 31 feet up in a swaying radar tower of a vessel proceeding in a winter sea at its record speed, completely enclosed and in absolute darkness, where substantial testimony by officers and crew members set forth *supra*, under Statement of the Case, supplemented by photographs and diagrams, clearly demonstrated the absence and need of a railing or guard line.

This was a general verdict sought by the parties without a request for special interrogatories. It is conceded in the majority opinion that the record discloses substantial evidence to support some of petitioner's contentions of liability, on any one of which the verdict may be sustained. On this, as well as the uncontradicted proof of the total absence of illumination, petitioner's abandonment by Richards, the slippery nature of the platform, etc., a directed verdict for petitioner below would have been proper. Accordingly, even if there were error in a small part of the Charge, which is denied, the complete picture of respondent's fault renders any such error immaterial and harmless.

The majority opinion below erroneously imposes an additional burden on petitioner. Not only is he required to prove an unsafe place to work and/or unseaworthiness causally related to his injuries, but also to prove the shipowner could have made an obvious danger safe and seaworthy. Respectfully, this is contrary to accepted principles of negligence and general maritime law, which require a shipowner to exercise reasonable care under the principles of negligence and imposes liability irrespective of due diligence for unseaworthiness.

Petitioner contends that the majority opinion dilutes the decisional authority that it is the shipowner's absolute and non-delegable duty to provide its seamen engaged in the ship's service with a safe and seaworthy vessel and equipment. The majority opinion represents an obvious invasion of the jury's province, in violation of petitioner's rights under the Seventh Amendment to the Constitution, to decide a simple issue of fact pertaining to ordinary standards of conduct. It thereby dilutes a Jones Act seaman's right to a trial by jury and substitutes instead a trial by experts on simple issues of obvious danger.

The majority opinion also invades the trial Court's function to decide whether there is need for an expert in light of a record where no testimony by an expert on naval architecture was offered by either party at the trial, nor required by the trial Court, unnecessary because the issue was simple and clearly visualized from substantial testimony and evidence offered by petitioner with respect to the obvious lack and need of a railing or other safety device on a platform without skid proof paint, adjacent to a man-sized opening, supplemented by clear photographs and complete diagrams made at the instance of respondent.

The dissenting opinion points to the majority's improper invasion of the jury's fact-finding function, relating it to a clearly erroneous blanket proposition that "any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a jury only if supported by expert testimony".

On the second question presented, the trial Court's award of future maintenance for three years, based on a voluminous record of hospitalizations, medical treatment and permanent disability, is amplified by reasons expressed for the record by the trial Court (R. 139). This award is entirely consistent with the grievous injuries necessarily found by the jury on which its award of \$110,000.00 was made, and the medical opinions as to future care and rehabilitation; erroneously reversed and meaninglessly remanded with the finality that "... the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (p. 124 of 293 F. 2d). Respectfully, had the Court of Appeals required further findings on future maintenance, despite the full record and the trial Court's reasoning in support of this award, there should not have been a reversal but

a remand for amplification by the same trial Judge. On the basis of the record itself, however, the award for future maintenance should be reinstated by this Honorable Court.

POINT I

To reverse a general jury verdict in a seaman's case because an expert was not called to temper the jury's fact finding function where the compounded danger of an unprotected hole was "fairly obvious" and within a lay juror's experience and ken, is contrary to all decisional authorities on similar issues, and in disregard of this Court's clear and consistent mandate on the inviolable constitutional function of a Jones Act jury.

The record is replete with proof of the need for and absence of: a railing or "other safety devices", such as an ordinary rope line to grasp instead of the inadequate substitutes in the bulky radar cable enclosure or the thin metal stiffeners projecting from the sides of the tower; or skid-proof paint on the worn platform, as to which respondent had given false answers to interrogatories; or a simple flashlight to compensate for the long known inadequacy of the lighting in the radar tower. A railing or guard line would undoubtedly have afforded petitioner an immediate hand hold and also a guard to prevent his fall into the unprotected man-sized opening under the foreseeable dangers of a darkened radar tower, vibrating excessively in a pitching and rolling vessel proceeding at its record speed in a winter sea. Can a reasonable man deny there were conditions of "fairly obvious danger"?

On the simple issue of fact related to the need or feasibility of construction of a railing or lifeline on a platform, 31 feet up in an enclosed radar tower, alongside

a man-size opening, the majority below ignores the ample testimony for petitioner on the lack of a protective device and the need therefor, but instead requires the unnecessary testimony of a naval architect. If required in this case, it will become the *modus operandi* in every subsequent trial where a simple ship's fixture or appurtenance is involved. This will promote the evil of protracted trials, experts pitted against experts, compounding the wrong by an improper invasion of the jury's independent fact-finding function. The use of expert testimony should be sparing, and limited to complex factual issues beyond the lay juror's ken. Respondent did not offer an expert on naval architecture, nor was there any contention recorded by respondent that petitioner was so required on the clear and simple issues involved. Neither did the trial Court, in its discretion, require it.

The majority opinion below ignores a basic premise in the use of expert testimony, long ago expressed by this Court in an even more complicated issue on the construction of a patent, in *Winans v. The N. Y. and Erie Railroad Co.*, 62 U. S. 88, 21 How. (U. S.) 88, 101, 16 L. Ed. 68 (1858), as follows:

"Experience has shown that opposite opinions of persons professing to be experts, may be obtained to any amount; and it often occurs that not only many days, but even weeks are consumed in cross examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury; and perplexing instead of elucidating the questions involved in the issue".

The New York Court of Appeals held long ago that the doubtful purpose and partisan effect of expert testimony

should not be freely allowed to confuse and dilute a juror's independent determination of truth. In *Roberts v. N.Y. & Erie R. Co.*, 1891, 128 N. Y. 456, 464, Peckham J., wrote for the Court to reject the use of expert testimony on the more complex issue of damages sustained by a property owner by reason of injury to his easements of light, air and access, following construction of the elevated 3rd Avenue Railroad, as follows:

"Expert evidence, so-called, or, in other words, evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible, the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. We have said lately that the rules admitting the opinions of experts should not be unnecessarily extended, because experience has shown it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable, and leave the jury to exercise their judgment and experience on the facts proved. As is stated by Earl, J., in *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544, 'It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts.'"

There was sufficient evidence of the need for a railing or other safety device, such as a rope line to guide and protect plaintiff while in complete darkness, for skid-proof paint on the platform proper, or even a flashlight that was not provided, to allow plaintiff to move safely on the platform to the crow's nest.

Any layman is familiar with platforms and ladders. The usual partly inclined ladder or stairway with railings can readily be compared from his everyday experiences with a vertical ladder to be ascended to a point where the platform without a railing or line for support is behind and beyond an opening 31 feet deep. To hold that a railing to grab, or a safety device in the nature of a guard line or similar hand-hold, must be the subject of testimony by a naval architect, is equivalent to a holding that a jury is not fit to pass on simple issues of obvious danger in any case. This is the sense of the dissent herein and the common sense of the matter.

The basic rules in the use of expert testimony are clearly ignored by the majority opinion below. They are set forth in a leading text on the subject, Rogers, *The Law of Expert Testimony*, 3rd Ed., 1941, Matthew Bender, Inc., Albany, N. Y., at pp. 50, 51, as follows:

"Within the rule excluding such evidence are ordinary standards of conduct of safety or danger, the operation of well known natural laws and the existence of social customs . . . If the facts can be placed before a jury and are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, the opinion of experts cannot be received. The fact that the expert witness may know more of the subject and better comprehend and appreciate it than the jury is not sufficient to warrant the introduction of his testimony".

See *Schillie v. Atchison, Topeka & Santa Fe Ry. Co.*, 222 F. 2d 810, 814, that:

"The determination of its admissibility is largely within the discretion of the trial court under the peculiar circumstances of each case."

Decisional references to the need for simple railings or guard-lines around open holes, particularly for deep openings on merchant vessels, necessarily prompt the conclusion that the obvious danger in the instant case was within a jury's province to determine "ordinary standards of conduct of safety or danger", supported by the testimony of Terry, Tribble, Richards and others who testified from their immediate experience and expertise on the particular factual situation involved, which testimony was supplemented by photographs and diagrams.

In *Zinnel v. United States Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47 (C. C. A. 2d, Dec. 1925), Learned Hand, *C.J.*, wrote that a seaman ordered upon deck cargo without being provided a guard line was deserving of jury determination without an expert's opinion, as follows:

"Without some guard line we need no expert to show us that a case was presented, which a jury must decide, as to the safety of the place where the intestate was ordered to work. Indeed, it seems to us hard to see how a jury could find for the defendant on this issue, as well as on the issue of the absence of the line" (p. 48 of 10 F. 2d).

Augustus N. Hand, *C.J.*, in *Kennair v. Mississippi Shipping Co., Inc.*, 197 F. 2d 605 (C. C. A. 2d, June 1952) held for a seaman who fell through an unlighted elevator shaft, by affirming a jury verdict predicated on the absence of an indicator or other device on deck to show where the elevator was at a given time. A similar contention to that involved herein was answered as follows:

"It is urged by the defendant that there is no evidence in the record as to what type of safety device a reasonably prudent shipowner would have, nor any evidence as to what precautions were taken on other

vessels. But such evidence was not necessary; for it was the function of the jury to apply the standard of care—what was reasonable under the circumstances—to the facts presented to it. *Bailey v. Central Vermont Ry., Inc.*, 319 U. S. 350, 353, 63 S. Ct. 1062, 87 L. Ed. 1444" (p. 606 of 197 F. 2d).

To require a marine architect to testify on the need for or the feasibility of construction of a railing or the placement of a life line at and about an unilluminated hole, 31 feet deep, through which a person's body could and did fall, is to drastically reduce the fact-finding function of a jury in a seaman's case. Cases are legion on the inviolability of a federal jury's function and need not be cited. See: *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457; *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6, 11 (Nov. 7, 1960); *Schultz v. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608.

This Court in *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, 98, 64 S. Ct. 455, held that "A finding of seaworthiness is usually a finding of fact", and at p. 104 related it to "supply and keep in order the proper appliances appurtenant to the ship". On the basis of the majority reasoning below in the instant case, a defective rope or cable should not prompt liability unless there be testimony by an expert that "proper marine architecture" requires an adequate one that could "feasibly" be manufactured. Such result is no less strained than that related to a railing or line on a platform adjacent to a man-size opening in the enclosed radar tower.

Clark, *C.J.*, in *Krey v. U. S.* (C. C. A. 2d, Dec. 1941), 123 F. 2d 1008 at p. 1010, pertinently held on the absence of any handle or rail in a ship's shower-room while the vessel was in port, much less dangerous than the instant factual situation, as follows:

"Viewed as a shower to be used at sea, the absence of any sort of handle or rail for support is alone almost enough to condemn it."

As the absence of a railing or similar device was held to be a simple issue and clearly unsafe in the cases cited above, without the need for an expert to tell the obvious, then how much more unnecessary is an expert where the absence of any rail or line is in the context of a speeding vessel at sea, the radar tower subject to excessive vibration, compounded by the long inadequate and then foreseeable total absence of any illumination?

This Court in *Milwaukee & St. P. R. Co. v. Kellog*, 94 U. S. 469, affirming 5 Dill. 537, 1 Cent. Law J. 278, long ago expressed the maxim that experts are not permitted to state their conclusions where the subject of proposed inquiry is a matter of common observation upon which the lay or uneducated mind is capable of forming a judgment. This principle was recently followed by McNally, J., in *Clark v. Iceland Steamship Company, Ltd.*, 179 N. Y. S. 2d 708, 6 A. D. 2d 544 (App. Div. 1st Dept., Nov. 1958), holding that opinion evidence was inadmissible as to adequacy or inadequacy of ship construction related to the absence of a life line between stowed hatch covers and the ship's rail. He wrote that seaworthiness is generally a jury question, not to be tempered by an expert's opinion, where the need of a life line was so clearly within the "ken of the experience, observation and knowledge of laymen" (p. 714 of 179 N. Y. S. 2d). Plaintiff's verdict was therefore reversed on the very ground that would have affirmed it in the instant case.

See: *Desrochers v. United States*, 105 F. 2d 919, 920 (C. C. A. 2, July 1939).

The strict and non-delegable obligations owed a seaman by his employer far transcend any obligations owed another on land, as a seaman "ties his fate to that of the ship", *Pope & Talbot v. Hawk*, 346 U. S. 406, 424. As the obligation of care is so much greater, the danger of a man-sized deep hole without a railing or other safety device for crossing over from a difficult position on a straight ladder is more sharply visualized and simpler to understand than where a parallel danger exists on land. In *Bedger v. United Orthodox Synagogue*, 148 Conn. 449, 172 A. 2d 192 (1961), the Supreme Court of Errors held that an unlighted porch without a suitable railing was an issue of fact that did not require expert testimony. The instant case is therefore *a fortiori*.

Recently the United States Court of Appeals for the Fifth Circuit (June 30, 1961), in *Pure Oil Co. v. Snipes*, 293 F. 2d 60, at p. 71, wrote as follows:

"More than that, there was a serious issue about the absence of any guard rail on the tank top. The evidence showed, as the permanent ladder manifested, an expectation that men would work on the tank top from time to time. True, no specific word testimony was offered that on some other rig the tank tops generally had a rail. Evidence was received, however, that such a rail would have been easily installed at little expense. *This was not a matter necessarily requiring expert testimony. The jury could have concluded that at that height, considering the curved surface and the possibility of falling onto the platform and perhaps into the sea, a prudent platform owner would have had some protective device.* Of course the matter is not to be determined by what is usual and customary. That may be evidence of due care, or the lack of it, but it is not the end itself. Quite apart from a ques-

tion whether the Coast Guard regulations, note 10, supra, technically cover the tank top, it is evident from §§143.15-1, 15-5, Title 33 C.F.R., that the Coast Guard considers that one of the principal hazards is that of falling from great heights. *As a matter of everyday common sense the jury may well have thought the same here.*" (Italics supplied.)

The obvious liability following failure to provide a handhold or rail was expressed by Dawson, D.J., in *Campbell v. Tidewater*, 141 F. Supp. 431 (U. S. D. C., S. D. N.Y., June 1956), citing the authority of *Schirm v. Dene Steam Shipping Co.*, 222 F. 587, as follows:

"If a ladder is set on such a substantial incline that, in order to maintain his equilibrium, the user is compelled to hold himself away from the ladder, then, of course, he must have a handrail, or something else extending above the ladder, to hold on" (p. 435 of 141 F. Supp.).

See: *The Leontios Teryazos*, 45 F. Supp. 618, 622, the Court stating:

"A ship should not be regarded as seaworthy unless there is some protective means to prevent its employees from falling down into the bunker. To hold otherwise would be a return to the dark past when little protection was afforded men of the sea."

It was the burden of respondent to establish instead that the construction of a railing or other safety device on an indoor platform would not be "feasible" from the standpoint of naval architecture. This it did not do. There is neither a complex issue nor any reason to support the need for expert testimony on this subject by either side.

The issue is not on the sufficiency of evidence *per se*, as the Court of Appeals stated there was substantial evidence sufficient to support a judgment. The issue is whether a lay jury could understand this substantial evidence without the refined explanation by a self-styled expert. If this be so, respondent failed to substantiate its own defense and contention on appeal as to the non-feasibility of construction of a railing or other safety device. It did not except to any question related to expert testimony, as none was raised. As there was no expert offered by either side, obviously the evidence submitted without being tempered by such testimony should be deemed sufficient to support the instruction on railings or other safety devices.

As a result of the general verdict petitioner established the negligence of respondent and the unseaworthiness of its vessel. It is unquestioned that all the lights were out when petitioner slipped and fell, and that he slipped and fell because of the multiple dangers known to respondent's responsible officers and crew-members. Respondent was bound by all issues submitted and the jury verdict was conclusive on all issues raised by the pleadings and submitted to the jury.

Where the conditions are aggravated by the absence of illumination, then the cases are even stricter on a shipowner with respect to the clear and simple requirement of a handrail or similar device. In *Read v. United States*, 201 F. 2d 758 (C. C. A. 3, February 1953), on the allegations of failing to provide sufficient lighting facilities and also to provide safeguards around the open deep tanks, solely on the issue of defective lighting appliances it was held there was a "failure to supply and keep in order the proper appliances appurtenant to the ship" so as to prompt unseaworthiness.

Also in point is *Johnson v. Griffiths S.S. Co.*, 150 F. 2d 224 (C. C. A. 9, June 1945), where the body of a seaman was found in an open hatch under conditions of poor visibility, and other dangers, including pitching of the vessel. Under these circumstances the Court held as follows:

"It is the duty of a vessel to provide a safe working place for members of its crew. What does it matter which one or how many of the negligent conditions caused the injury . . . Under these circumstances the maintenance of an open hatch with no lifeline about it constitutes negligence which is so closely related to the injury in this case as to impel the conclusion that it was the proximate cause of the death" (p. 226 of 150 F. 2d).

Rhetorically, need a naval architect testify on the construction of a simple railing, or easy placement of a line, where a hypothetical question must include the facts of pitching, vibration, the 31-foot hole and the absence of any illumination? The issue is simple and the answer obvious.

By incorporating the FELA, 45 USC 51 *et seq.*, into the Jones Act, the following holding by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, is pertinent:

"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (p. 506 of 352 U. S.).

In accord:

• *Ferguson v. Moore-McCormack Lines, Inc.*, *supra*.

In *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424, 431, 59 S. Ct. 262, this Court expressed its liberal interpretation of the Jones Act, stating that seamen were "wards of the admiralty." Accord therefore should be given to the jury's verdict on the issues submitted under the Jones Act and related unseaworthiness causes of action. See *Jacob v. City of New York*, 315 U. S. 752, 62 S. Ct. 854.

POINT II

Uniform principles of general maritime law, heretofore expressed by this Court, are severely disrupted where the majority below would impose a novel burden on a seaman to prove in addition to an unsafe place to work and/or unseaworthiness, that the shipowner could have "feasibly" corrected its breaches of an absolute duty.

The test of reasonable fitness was not met by respondent in light of the unanimous jury verdict and the record on which it was based. Its absolute, continuing and non-delegable obligation to a seaman, here breached in multiple respects, cannot be excused by imposing on petitioner a novel and additional burden of proving that which was unsafe and unseaworthy could have "feasibly" been made safe and seaworthy. Petitioner's burden should have been no more than to convince a jury by the fair preponderance of the evidence that the facts he asserted are more probably true than false. *Burch v. Reading Co.*, 240 F. 2d 574, cert. den. 353 U. S. 965, 77 S. Ct. 1049; *Lavender v. Kurn*, 327 U. S. 645, 653, 66 S. Ct. 740, 744; *Chalonec v. Mathiesen's Tanker Industries, Inc.*, 287 F. 2d 929, 931.

Reference to the specific words in the instruction prompting reversal below must disclose that it conforms to the record, to the proper performance of a Judge's function

in relation to reasonable inferences a jury may make from the proof, and is in compliance with basic principles of negligence. The majority below now requires a new test of sufficiency of evidence in a negligence case. No longer is an instruction sufficient that negligence might follow on the failure to provide a railing or other safety device around an open hole, but an additional requirement is stated now that petitioner must further prove defendant could have "feasibly" constructed a simple protective device to make the place safe and seaworthy. Respectfully, this stretches petitioner's burden of proof to the breaking point of unreasonableness.

In this light petitioner respectfully refers again to the dissenting opinion below, particularly where reference is made to the feasibility of constructing a railing on an indoor platform (which also means to provide a simple life line as used on every vessel); and that the burden to show such a simple undertaking could not be done should properly devolve on the shipowner. See: *The Pennsylvania*, 86 U. S. 125; *Mason v. Lynch Brothers Company*, 228 F. 2d 709, 712; *Hill, Jr. v. Atlantic Navigation Company*, 218 F. 2d 654.

The late Jerome Frank, *C.J.*, in his concurring opinion on a shipowner's failure to provide garbage chutes, pertinently stated the following in *Poignant v. U. S.*, 225 F. 2d 595, 602:

"Here the defendant owed plaintiff an absolute duty to provide a safe place to work. It may well be that, if defendant were to prove that there were no means, reasonably available, to keep the passageway free of garbage, the existence of the dangerous condition would not have constituted unseaworthiness; but the

fact of such unavailability is a defense which defendant has the burden of proving." (Italics supplied.)

See: *The Edith Godden*, 23 Fed. 43.

Inconsistently, the majority opinion below concedes that the general verdict is supported by substantial proof in the record. A new curiosity is advanced that the jury verdict was not conclusive on all issues raised by the pleadings and submitted to the jury because a small part of the Charge, raised in passing in the briefs below and not even referred to in oral argument, renders wholly defective a general verdict sought by the parties without a request for special interrogatories.

On the uncontradicted fact that there was a total absence of any illumination at the time of accident, compounded by the prolonged absence of illumination from the upper two lights, a directed verdict for plaintiff on the ground that this condition at the very least contributed to the accident, was necessary and proper. We are taught that seaworthiness is not dependent on the span of time between failure of equipment and injury. *Mitchell v. Trawler Racer*, 362 U. S. 539, 80 S. Ct. 926, and *Petterson v. Alaska Shipping Co.*, 205 F. 2d 478, *aff'd* 347 U. S. 396. A bulb that fails is not reasonably fit for its purpose of giving illumination. Accordingly, this would make immaterial any error of instruction related to finding liability. See Rule 61, F. R. C. P. on "Harmless Error."

POINT III

The issue of future maintenance was properly left to the trial judge by the parties and his award in favor of petitioner was based on substantial proof and proper inferences, and was not clearly erroneous, nor does any decision by this Court hold that "no payments should be made for future maintenance and cure".

It is apparent that the fabric of maritime law as it pertains to maintenance for a seaman is severely disrupted by the majority opinion. Without any basis in a definitive ruling by this Court the majority below concludes that "... the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure." The reference to Mr. Justice Jackson's opinion in *Farrell v. U. S.*, 336 U. S. 511, 69 S. Ct. 707, is inapposite to the instant facts and taken out of context.

Despite the trial Court's proper exercise of discretion in awarding future maintenance, in tandem with the heretofore respected and traditional province of trial Courts in the admission or exclusion of expert testimony, he was reversed without reference to the principle on review expressed in *McAllister v. U. S.*, 348 U. S. 19. Is this not a continuation of a new approach, without sanction by this Court, expressed for non-jury cases in *Romero v. Garcia & Diaz, Inc.*, 286 F. 2d 347, whereby the Court of Appeals for the Second Circuit held that its scope of review is expansive to the extent that it may review the evidentiary basis of findings and conclusions, "Despite possible negative inferences that might have been drawn from *McAllister v. United States*, 348 U. S. 19 (1954)" (p. 355 of 286 F. 2d)?

The issue on maintenance was withheld from the jury in strict compliance with the conditions expressed by the same Court in *Bartholomew v. Universe Tankships Inc.*, 279 F. 2d 911. Reversal herein was grounded in an improper standard in reviewing the medical evidence and reasonable inferences to be drawn therefrom. See: *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 80 S. Ct. 173.

There is no room to cite the many cases on awards for future maintenance in accord with the principle expressed in Gilmore and Black, *The Law of Admiralty*, The Foundation Press, Inc., 1957, p. 268, as follows:

"The amount awarded for maintenance lies largely in the discretion of the trial judge."

When maintenance ends is a question of fact to be determined on the basis of the evidence presented. *Ziegler v. Marine Transport Line*, 78 F. Supp. 216; *Jones v. Waterman Steamship Corp.*, 155 F. 2d 992. With respect to the principle of *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525, 58 S. Ct. 651, there is recognition that future lump sum payments can be made "*in the discretion of the Court*, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained" (pp. 531 and 532 of 303 U. S., italics supplied). That the *Calmar* decision was not meant to limit an award for future maintenance was discussed in *Moyle v. National Petroleum Transport Corp.*, 150 F. 2d 840, and also in *Loverich v. Warner Co.*, 118 F. 2d 690, by the Court of Appeals for the Third Circuit. The advantage and consistency of lump sum payments is expressed in Gilmore and Black, *The Law of Admiralty*, *supra*, on page 266 as follows:

"It follows that the seaman may bring successive suits and that a prior recovery will not bar a subsequent action. Usually of course, even in a disputed case, one trip to the courts will settle the issue for the parties, and no instance has been found of a maintenance and cure claimant actually bringing more than one action against the same employer."

This text also discusses the leading maintenance cases on pages 264 and 265 and points out that there can be a distinction where the ship's fault prompted the injury, as contrasted with a shoreside accident to a seaman on shore leave, where the maintenance items are not duplicated in the damage action, as in the instant case. Certainly a pre-existing illness or a shoreside accident to a seaman on furlough cannot be compared to the instant accident and causally related disabilities.

With respect to the period of future maintenance, a conservative estimate of three years, in *Muruaga v. United States, et al.*, 172 F. 2d 318, the Court stated as follows:

"What allowances in money for maintenance and cure in addition to hospitalization and treatment actually furnished have been made in other cases and the time periods on which those allowances have been based are irrelevant. Each case is to be decided on its own established facts" (p. 321 of 172 F. 2d).

In accord:

Brown v. Dravo Corp., 258 F. 2d 704.

In light of the above, it is apparent that comparing petitioner's past inability to attain the maximum benefits of medical attention with what he can reasonably expect in

the future, the extent of the injuries; that petitioner is still an outpatient for rehabilitation, a former alien, now an American citizen, perhaps much later capable only of performing sedentary work beyond his training and experience as a seaman, that the award for three years was eminently fair and conservative. The award is in fair perspective with the jury's verdict for liability damages in the amount of \$110,000.00. A further consideration, as expressed in *Gilmore and Black, supra*, is that our courts should not be congested by periodic and frequent actions for maintenance which could be readily disposed of in one determination.

The Court of Appeals did not hold that the trial Court's recorded reasons to support the award of future maintenance were clearly erroneous, but simply substituted its own judgment for that of the trial Judge. In so doing, it violated the standards laid down by this Court in *McAllister v. U. S., supra*, and the reasonable inferences to be drawn from medical testimony expressed by this Court in *Sentilles v. Inter-Caribbean Shipping Corp., supra*. At the very least, if more formal findings were required, the Court of Appeals should have remanded this cause to the same trial Judge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be reversed except as to its affirmance of the award for past maintenance.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961.

No. 283.

JAMES VICTOR SALEM,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE RESPONDENT.

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IN THE
Supreme Court of the United States

OCTOBER TERM 1961

NO. 283

JAMES VICTOR SALEM,

Petitioner

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Stripped to its essentials, the real question before this Court as to negligence is whether a seaman may recover damages from a shipowner on the theory that its vessel was negligently constructed without proving any standards of proper naval architecture.

Stated another way, may a jury find a shipowner negligent in failing to furnish unidentified "safety devices" or railings when the shipowner, on the one hand, proves that the area in question is safe without "safety devices" and railings, and on the other hand, the seaman fails to establish by competent proof that "safety devices" and railings should have been installed.

2. May a trial court award 3 years' future maintenance where (a) there is no evidence to support the award and (b) where the court did not make findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Most of the salient facts are set forth in the majority opinion of the court below. (199-207)* However, one very important statement, hereinafter mentioned, is inaccurate.

For reasons too obvious to need recital, petitioner has included "facts" in his brief, under "Statement of the Case", some of which are of doubtful accuracy but which, in any event, have no relation to the narrow issues involved in this appeal. These will be disregarded by respondent in conformity with Rule 40 of the Rules of this Court.

Petitioner testified that as lookout seaman he reported for duty at 12:00 midnight to his post in the crow's nest. (19, 20)

The crow's nest on the SS. *United States* is of vastly different construction from the common conception of the term as laymen know it. The crow's nest on other vessels, is normally situated on the foremast well above the bridge so as to provide better visibility for the look-outs. Generally, it is a basket shaped compartment with some protection against the weather. Entry to it is usually gained through a trap door in the floor. The ladder leading to it is a straight ladder exposed to the weather. Because of its location on the vessel no light is provided.

The petitioner and his witnesses were experienced with such ladders and admitted having had to use them under inclement conditions on a rolling vessel (32, 87, 88, 218, 219).

The ladder on the SS. *United States* was purposely constructed so as to provide maximum protection and safety for members of the crew having to use it. It was located within the radar tower, a tubular hollow structure. From

* References are to the Transcript of Record.

the base of the tower to the crow's nest platform measures 31'. Inside the tower is a steel ladder leading to the crow's nest. This ladder is 15" in width having flat 1" x 1" rungs spaced 12" apart. The ladder rises from the deck to the first platform at a 74° angle. Then rising at a right angle from the first platform the ladder passes through three platforms having openings of 18" x 30" x 24" before it reaches the platform on which the crow's nest is located. The distance from the deck to the first platform is 10' 4" while the distance between the other platforms is 5' 2". These platforms are composed of steel and are positioned horizontally to the main decks.

At the level of the crow's nest, the platform through which the ladder passes, at its widest point, is 46" and at its narrowest 36". The platform itself is 73" fore and aft between the ladder and the crow's nest. (Pltfs Ex. 4) The crow's nest is reached by walking forward about 4' from the ladder.

The crow's nest itself is a projection on the radar tower in which a seaman can maintain his watch and be fully protected from the elements. A swinging door to the crow's nest is kept closed in order to exclude light from shining forward. The crow's nest was equipped with a telephone which was directly connected to the bridge. By this telephone, the look-out could report objects ahead and also any trouble which might develop in the area where he worked. For example, when lights burned out, he was duty bound to report directly to the bridge (49). There was always an electrician on duty whose job it was to replace bulbs (37).

The ladder and the platform leading to the crow's nest were in frequent service. One of petitioner's witnesses testified that during the 160 voyages which he made he had occasion to use the ladder and platform over 14,000 times (216,

219, 220). The two other regular look-outs would have to utilize the ladder the same number of times. In addition three relief look-outs would use the ladder and platform 4 times each a day.

During all this use of the ladder and the platform, there had never been an accident excepting the one involving petitioner (50). Petitioner himself admitted that he had had no previous trouble using the ladder and the platform (31). Incidentally, it was conceded that the ladder itself was in no wise defective (30).

On the night of the petitioner's accident, although he maintained that lights were out during his entire watch, he never reported the situation to the officers on the bridge (21) although it was his duty to do so (49).

Petitioner had served part of his watch before his accident, and was relieved by seaman Richards. On descending the ladder he observed that two of three lights in the tower were out (20). The same condition prevailed an half hour later when he ascended the ladder on his return from coffee time. He had placed one foot on the platform and as he was transferring the other, the light went out. However, he reached the platform safely.

It is at this point, where the opinion of the court below is in error with respect to petitioner's position on the platform. For the convenience of the court, there is quoted in the margin the testimony given by petitioner in respect of this.¹

¹ (27) Q. I am talking now about the time of your accident. Do you understand that? A. Yes.

Q. I say that after the light went out, you had your both feet on the platform. A. That's correct.

Q. At that time were you facing towards the doorway to the crow's nest? A. It wasn't exactly facing the door. Just like I told

This testimony shows that petitioner reached the middle of the platform safely and was stepping forward when in some way, not explained in the testimony, he lost his balance and fell. He had but to take one more step to reach the doorway leading to the crow's nest. His fall was not due to the darkness. He did not step into the access hole. He was not holding on to anything at the time, although if he had stretched out his arms, he could conveniently take hold of the sides of the radar tower, which had a stiffener or shelf running around it at shoulder level (28-30).

you before, I was half—what do you call this? I was half to the starboard and half to the forward, but more to the forward.

Q. At that time and before you fell, did you have your hands along your sides? A. Before I fall?

Q. Yes. A. You don't make it too clear to me.

The Court: Where were your hands when you fell?

Q. Where were your hands before you fell? A. Just like this (indicating).

Q. Hanging along your sides? (28) A. Yes.

Q. Both hands? A. Yes.

Q. You were not holding on to that radar casing? A. I already moved from it.

Q. You were not holding on to it? A. No.

Q. Then I understand the next thing you did was to take one step forward towards the crow's nest, and then that is the time that you fell? A. No. I already moved one foot before that.

Q. You already had gone one foot towards the crow's nest? A. Not to the crow's nest. To the side; to the middle.

Q. To the middle? A. Yes.

Q. Was that step that you took forward towards the crow's nest? A. That's after I take the step with the left foot, and at that time I remember I was in the middle. That's the time I slipped.

Q. In the middle of the platform? A. Yes.

Q. As you stood in that position in the middle of the platform, if you had extended your hands on each side, you could have touched each side of the area or the radar tower, could you not? A. I tried to.

Q. I say you could do it. A. I could, but I don't have the time yet to grab it.

Q. I am talking about after the lights went out. A. Yes.

Q. You had your feet on the platform. A. Yes.

In a statement given on board the ship, petitioner said he was actually stepping into the crow's nest as he fell. (Pltf's Exh. 7) He retracted this later on.

In any event, no claim is made that there was any grease or oil on the platform and from all that appears in the testimony, petitioner merely lost his balance. Whether it was due to the roll of the ship is not known, but even if it were, it would not cast the shipowner in damages. A seaman must be able to maintain his balance on a rolling ship. (32) Or as expressed by Judge Mayer in *Adams et al v. Bortz* 279 F. 521, 525 (C. A. 2nd, 1922), "Ships roll, and those who go to sea must have sea legs."

Moreover, petitioner was fully familiar with the area and the platform. (30, 31) He had been a lookout for almost a year and had had to use the ladder and the platform 8 times a day. Therefore, over the period of a year during which he had been look-out, petitioner had used the ladder and platform hundreds of times and could not help but be fully familiar with it and its surroundings. His familiarity should have enabled him to proceed around the platform in total darkness. On other ships as look-out, he would have to proceed in total darkness while being exposed to the elements (32).

The platform provided him on the *SS United States* was substantially safer than the access to crow's nests on other vessels. Nowhere in the trial court did petitioner challenge this fact.

The only other factual matter within the limits of the issues before this Court is the allowance of three years future maintenance. The award by the trial court was set aside because of the absence of evidence to support it.

Nowhere in his brief does petitioner point to any testimony which supports an award of three years future maintenance. Indeed, there was none, as the court below properly found. There is quoted on page 18 of this brief, the finding of the court below in this regard.

There was substantial basis for this unanimous finding by the Court of Appeals. As the record shows, there was a very serious dispute as to the nature and extent of petitioner's injuries. While petitioner's doctors said that he was permanently disabled, respondent's doctors said that petitioner was fit for duty, as did also Marine Hospital doctors. Petitioner's doctors based their opinions on petitioner's complaints that he was unable to walk without a limp and that he was unable to bend or lift. In addition to showing through its doctors that petitioner could perform all these acts, respondent produced motion pictures of the petitioner showing that he was able to walk without a limp, without the need for a cane, and could fully bend and lift. For example, the motion pictures showed petitioner striding along the street at a fast gait, bending over repairing his car and even jacking it up with a hand jack [Def't's Ex. K] (190-191).

Moreover, petitioner, in his applications for a license to drive automobiles stated that he did not have any mental or physical disabilities (81).

SUMMARY OF THE ARGUMENT.

It should be noted at the outset that the points raised in this Court are but two of the matters argued in the Court of Appeals. The court said (207) it believed "it unnecessary to discuss the many other errors complained of" because of its conclusion that a new trial was necessary in

any event. Judge Waterman said (211) "An examination of the whole record convinces me that the full retrial ordered by the panel majority is desirable".

"[T]he many other errors" (207) will not be set out. Sufficient to say that respondent maintains throughout that it did not have a fair and impartial trial.

Accordingly, either the order for a new trial must be affirmed or the case must be remanded to the Court of Appeals for consideration of the numerous other errors.

This situation alone points up the lack of importance of the bare two questions now raised. They really concern only questions of sufficiency of evidence.

Respondent asserts that in a Jones Act (46 USC 688) case, a seaman must prove negligence to support a recovery for damages and that that negligence must be shown to have been the proximate cause of his injury.

Respondent showed that the area in question had proven safe over a period of eight and one half years. Petitioner talked about hand rails but never showed that their absence caused his accident. The trial court in its charge added the term "safety devices" (114-123) without defining them, but even as to these (whatever they are supposed to be) their absence was not shown to have been a proximate cause of the accident.

Petitioner admitted that he made no effort to support himself by his hands. He kept his hands at his sides when he could easily have maintained his balance by extending his arms, and taking hold of the sides of the enclosure. (See petitioner's testimony set forth in the margin on pages 4-5 of this brief.)

Petitioner's contention that there was a "fairly obvious danger" is without merit. The so-called danger relates to the access hole leading to the crow's nest platform. The hole could not be covered and at the same time permit one

to pass through the platform. Moreover, petitioner was away from the hole at the time of his accident. By his own admission he had taken at least one step away from the hole. Thus this is not a case of a person stepping into a hole because of inability to see. Petitioner says he fell into the hole because he lost his balance to which should be added that he could have saved himself if he had taken the precaution to hold on to appliances readily at hand.

It is respectfully submitted that before a shipowner is cast in damages in a Jones Act (46 USC 688) case, the seaman must do more than merely mention appliances and contend that their absence caused an accident. He should be required to submit solid proof of the shipowner's failure to comply with proper standards of safe construction by persons competent to give positive evidence.

The award of three years future maintenance violated the rule established by this Court in *Calmar Steamship Corp. v. Taylor* (303 U. S. 525), that a seaman's recovery must be limited to "such amounts as may be needed in the immediate future * * * for a period which can be definitely ascertained".

There was no evidence within these limits and no findings made that there was, and the award contravened Rule 52 of the Rules of Civil Procedure.

POINT I.

IT IS RESPECTFULLY CONTENDED THAT THIS IS NOT A CASE WARRANTING THIS COURT'S CONSIDERATION BOTH FROM THE POINT OF VIEW OF THE LACK OF IMPORTANCE OF THE QUESTIONS RAISED AND BECAUSE THEY MERELY BRING UP FOR REVIEW THE QUESTION OF SUFFICIENCY OF THE EVIDENCE AND WITNESS CREDIBILITY.

It can be seen from the foregoing recital of facts that the questions before this Court are indeed not of national importance and their determination concerns only the parties here involved. Moreover, the questions raised concern only sufficiency of evidence.

Even though certiorari was granted, this Court may still hold that the grant was improvident and dismiss the petition. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 393; *McAllister v. United States*, 348 U. S. 19, 24; Rule 19 of the Rules of this Court.

POINT II.

IF IN A JONES ACT (46 USC 688) CASE, A SEAMAN RELIES ON NEGLIGENT SHIP CONSTRUCTION AS HIS BASIS FOR RECOVERY, HE MUST PRODUCE COMPETENT PROOF THEREOF BY QUALIFIED WITNESSES. A JURY MAY NOT MAKE A FINDING OF NEGLIGENT SHIP CONSTRUCTION ON MERE MENTION OF RAILINGS OR UNSPECIFIED APPLIANCES. NOR MAY HE HAVE RECOVERY WITHOUT PROOF THAT THE NEGLIGENT CONSTRUCTION WAS THE PROXIMATE CAUSE OF HIS ACCIDENT.

Petitioner's argument in this Court is based on the allegation that the crow's nest platform was negligently constructed and that a jury could determine this claim

without evidence by qualified persons. He argues that a jury of laymen could make a determination without the aid of experts. In this connection, this Court should bear in mind that petitioner vigorously objected to the introduction in evidence of an exact size model of the crow's nest, which would have helped the jury in reaching a conclusion. The one solid piece of evidence which would have aided laymen was the model which petitioner was successful in having excluded from the jury's view.

Had the model been examined by the jury, it would readily have seen the ease with which petitioner might have maintained his balance and avoided falling. The jury could have seen also that "railings or other safety devices" were unnecessary and that their absence did not constitute negligent construction.

The respondent proved that the area was safe, there having been no accidents (other than that which the petitioner claimed) for a period of over eight and a half years although the area had been in use on thousands of occasions by the lookouts.

"The fact that premises or appliances have been used for many years by many persons, without injury, or that no evidence was produced that any other person than the plaintiff had been injured, is a strong circumstance in disproof of negligence in the use of such premises or appliances." 1 *Shearman and Redfield on Negligence*, Section 59, at 168, Revised Edition (1941).

See also *Hubbell v. City of Yonkers*, 104 N. Y. 434, 10 N. E. 858; *DiSalvo v. Stanley-Mark Strand Corp.*, 281 N. Y. 333; *Levinowitz v. Cunard White Star*, 129 F. Supp. 555 (S. D. N. Y. 1955); *Martucci v. Brooklyn Children's Aid Soc.*, 140 F. 2d 732 (2 Cir. 1944). See also the annotations of various state court decisions in 31 A. L. R. 2nd 190.

The Court of Appeals ordered a new trial with respect to the negligence count because of error in the charge to the jury. The trial court ordered the jury to award petitioner damages "if you find the defendant was negligent in failing to provide railings or other safety devices". The Court of Appeals correctly found that there was no evidence of any kind in the record to support this charge. It was not shown that railings could feasibly be constructed or should have been installed, or for that matter that failure to provide such railings constituted negligence or made the ship unseaworthy. Nor was there any proof that railings could have prevented the accident. On the contrary, the proof showed that petitioner made no effort to support himself by use of his hands. He could have done this merely by extending his arms to the sides of the tower where he could have held on to a ledge projecting at about the level of his shoulder. Moreover, there were other objects within reach which he could have grasped. This petitioner failed to do. Petitioner admitted that at the time of his accident his hands were at his side so, hypothetically, even if there were additional handholds to which petitioner could have grasped for support, the fact of the matter is he did not attempt to grasp anything.

Petitioner did not even maintain on the trial that there should have been "other safety devices". This was one of the prejudicial matters that the trial court inserted in the absence of any claim or proof thereof. Moreover, there was never even a suggestion as to what the "safety devices" should be.

Actually, petitioner's claim as to railings and "other safety devices" should have been dismissed for failure of proof; allowing petitioner a second chance to make this proof is more than he deserves.

The opinion of the Court of Appeals states: (202)

"Plaintiff and a seaman, Richards, testified that there was no railing inside the tower at the crow's nest level of the tower. However, there was testimony that there was a radar enclosure or casing which plaintiff could hold to, and did grasp with his left hand, as he stepped onto the platform. Plaintiff also testified that there was a shelf or stiffener encircling the inside of the tower about shoulder high as plaintiff stood on the platform. The tower enclosure varied from 36 to 48 inches in width so that plaintiff could have reached each side of the wall of the tower from the platform by raising his arms. There was no expert testimony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest."

After posing the question to itself whether or not, under the above conditions, the jury should have been permitted to decide whether proper marine architecture required railings or other safety devices, the court below found it was error to submit this question to the jury without expert testimony. All of the reported cases say that to find liability there must be some proof of negligence. Petitioner's claim concerned ship construction and a lay jury could not determine what was or was not proper construction without some evidence to guide it. Petitioner offered none. Respondent proved that the area had always been safe.

Having found prejudicial error in the charge to the jury, the court employed the language used in *Fatovic v. Nederlandsch-Americaansche Stoomvaart, Maatschappij* (2 Cir. 1960), 275 F. 2d 188, 189:

“Since we cannot determine from the general verdict brought in by the jury whether they relied upon a proper or improper claim of unseaworthiness in reaching their decision, we must reverse the judgment and order a new trial.”

See also *Rosenquist v. Isthmian Steamship Company*, 205 F. 2d 486 (C. A. 2nd 1953); *United N. Y. & N. J. Pilots v. Halecki, Admr.*, 358 U. S. 613, 619.

Petitioner's claim of “fairly obvious danger” is likewise without merit. The alleged “danger”, the manhole in the platform, through which the ladder passed, is necessary to admit one to the platform. As the testimony showed, the crow's nest ladder on the SS. *United States* is safer than on other vessels where the crow's nest ladders are exposed to the elements and require seamen to ascend a straight ladder some forty feet. In contrast, the ladder on the SS. *United States* is within the tower and has 3 or 4 platforms on which a seaman can rest on his way to the crow's nest.

The opening in the crow's nest platform is only 18" by about 24" to 30". Petitioner had safely negotiated this opening and had taken a step away from the opening when his accident occurred. (28). Had petitioner taken one more step he would have been at the door leading into the crow's nest. Thus, he was safely on the platform away from the opening and away from the “obvious danger”. The access hole in the platform did not cause his accident. Having served as a lookout on the SS. *United States* for approximately 1½ years before his accident, petitioner had climbed the ladder and crossed to the crow's nest on hundreds of occasions without incident. In point of fact, since the SS. *United States* was constructed in 1952, there has been but one accident, petitioner's, on the crow's nest platform. It is well established that respondent could not be held negligent in

constructing or maintaining the crow's nest platform on its vessel when respondent was unaware of any defective or dangerous condition existing therein. There had never been any accidents in this area. Certainly, this area could not be considered one of "fairly obvious danger".

Matters in relation to nautical architecture require expert testimony. *Anton Fatovic v. Nederlandsch-Amerikaansche Stoomvaart, Maatschappij*, 275 F. 2d 188 (C. A. 1960) where the court said at page 190:

* * * "In any event, the question was one of nautical architecture about which jurors lack the knowledge to form an intelligent judgment in the absence of expert testimony, *Martin v. United Fruit Co.*, 2 Cir. 272 F. 2d 347. Since there was no expert testimony on the matter, it should not have been submitted to the jury." * * *

and again at page 189:

"The dispositive question on appeal is whether the trial judge erred in charging the jury that the existence of certain conditions would have rendered the ship unseaworthy. We conclude that, as to at least two of the five conditions, there was no evidence from which the jury could have found that their existence made the ship unseaworthy. It was therefore error to submit the case to the jury on these claims, and we must reverse the judgment and order a new trial."

Respondent's brief (pp. 11-14) in opposition to certiorari distinguished the cases emphasized by petitioner. Petitioner's current brief includes additional cases which are distinguished now. These new citations do not support his claims.

Bader v. United Orthodox Synagogue, 148 Conn. 449, 172 A. 2d 192 (1961). Plaintiffs fell from the back porch

of a residential building used as a meeting place. The door leading from the house made it necessary for persons leaving to walk close to the edge of the porch which had no railing. While attempting to leave the building across the unlighted porch they fell therefrom. The court held merely that a jury could find that such construction was negligent. This fact situation has no relationship whatever to the case at bar. In *Bader* the plaintiffs had never been on the porch whereas petitioner had been in the crow's nest structure hundreds of times. He was fully familiar with the area, in which there were means for support.

Pure Oil Company v. Snipes, 293 F. 2d 60 (5 Cir. 1961) (petitioner's brief p. 31). Snipes was a member of an oil drilling crew who fell from an oil drilling platform located 65 miles offshore. Snipes was thrown from the curved top of a water tank when a pipe broke. He passed through a hole in the drilling platform left by removed gratings. The tank itself was part of the permanent equipment of the platform. The top of it presented a curved surface about 15 feet above the deck of the platform. There were no hand rails or safety lines around the edge of the tank top although the tank was equipped with a permanent welded ladder evidencing defendant's knowledge that persons would be required to work on the tank top.

The physical surroundings in the Snipes case are in no way comparable to those in the case at bar. In Snipes the floor was curved with no place for one to take hold or maintain his balance. In the case at bar the footing was flat and the area was confined so that one could maintain his balance by merely extending his arms. In any event, the language quoted in the petitioner's brief is *dicta*, the decision turning on a different point.

In *The Leontios Teryazos*, 45 F. Supp. 618, 622, the court sitting in admiralty held that libelant's negligence was the sole cause of his accident which occurred when he fell into an open hatch. In a finding limited to the precise facts of the case the court held that the hatch should have had some protective measures such as covers, rails, stanchions or guard chains. However, recovery was denied because libelant failed to offer any proof that such devices were not available on the vessel and libelant's lack of candor in testifying, not the absence of appliances, caused the court to conclude that libelant's negligence was the sole cause of his accident.

Finally, the shipowner's duty is well defined in *Mitchell v. Trawler Racer Inc.*, 362 U. S. 539, where Justice Stewart stated at page 550:

* "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin v. Lykes Bros. S. S. Co.*, 348 U. S. 336."

POINT III.

A.

THE UNANIMOUS REVERSAL OF THE AWARD OF 3 YEARS' FUTURE MAINTENANCE WAS CORRECT BECAUSE THE AWARD WAS NOT SUPPORTED BY ANY EVIDENCE.

B.

THE TRIAL COURT ERRONEOUSLY FAILED TO MAKE ANY FINDINGS TO SUPPORT ITS AWARD AS REQUIRED BY RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE AWARD WAS REVERSIBLE ON THIS GROUND ALONE.

C.

PETITIONER WAS NOT ENTITLED TO FUTURE MAINTENANCE BECAUSE HE HAD FAILED TO TAKE THE RECOMMENDED REHABILITATION TREATMENTS.

A.

The court below after examination of the record found that there was no evidence to support an award of future maintenance. It said (204):

"The only evidence pertaining to a period of future maintenance, or the duration thereof, is the testimony of two doctors. Dr. Granbard testified to the effect that, at the time of the trial, plaintiff was still disabled and not capable of any work as a seaman. Dr. Kaplan testified to the effect that the likelihood of improvement was remote, and that it may be that plaintiff would get worse and require more specific therapy. There was no evidence that plaintiff

required three years future treatment. Plaintiff's doctors did not testify as to probable duration of future treatment, if any. We do not think there was sufficient evidence upon which to base a finding of a three year future maintenance period."

After discussing *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525, the court made reference to *Farrell v. United States*, 336 U. S. 511, wherein it was held that maintenance and cure payments would be required only until such time as the seaman was cured or was found to be incurable. Relating this language to the facts in the case at bar, the court stated: (205)

"The extreme uncertainty surrounding either or both of these possibilities would appear to make any award for future maintenance improper in this case. For instance, in the instant case, there is, in addition to the possibility of plaintiff's full recovery from his back injuries, the further possibility that his not-so-latent psychotic condition might get the better of him at any time. If he became permanently insane, even if that condition were reliably linked to the accident, his maintenance payments would cease."

The court below concluded: (205)

"There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that three years is the period reasonably to be expected for Salem to reach maximum improvement."

Petitioner does not even attempt to support the award by the trial court with any reference to the facts adduced on the trial and, actually, no facts exist in the record to support the award. Petitioner does not challenge the conclusion made by the court below and quoted above. The situation then is that the trial court made an award with-

out any basis in fact and the Court of Appeals reversed it on findings that there was no evidence to support the award.

Petitioner's attack on the unanimous opinion of the court below in reversing the award for future maintenance is based on a misconception of what this Court held in the two classic cases of *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525; and *Farrell v. U. S.*, 336 U. S. 511.

In *Calmar Steamship Corp. v. Taylor*, this Court was faced with the question of whether the award of maintenance for 7 years in the future was erroneous. Holding that it was, this Court said in *Calmar* (303 U. S. 525) at page 530:

"The award of a lump sum in anticipation of the continuing need of maintenance and cure for life or an indefinite period, is without support in judicial decision. Awards of small amounts to cover future maintenance and cure of a kind and for a period definitely ascertained or ascertainable have occasionally been made. *The Mars*, 149 Fed. 729, 730 (C. C. A.); *Wilson v. Manhattan Canning Co.*, 205 Fed. 996, 997 (D. C.). But the award here seems to us to be inconsistent with the measure of the duty and the purposes to be effected by its performance. The duty does not extend beyond the seaman's need. *Raymond v. The Ella S. Thayer*, 40 Fed. 902, 903 (D. C.); *The J. F. Card*, *supra*, 95; *The Bouker No. 2*, *supra*, 835; *The Santa Barbara*, 263 Fed. 369, 371 (C. C. A.); *Stewart v. United States*, 25 F. (2d) 869, 870 (D. C.); *Marshall v. International Mercantile Marine Co.*, 39 F. (2d) 551, 553 (C. C. A.); cf. *Holt v. Cummings*, 102 Pa. 212; *contra*, *Reed v. Canfield*, *supra*. The amount and character of medical care which will be required in the case of an affliction, as well defined even as Buerger's disease, cannot be measured by reference to mortality tables. More-

over, courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seamen through recourse to that service. *The Bouker No. 2*, *supra*, 835; *Marshall v. International Mercantile Marine Co.*, *supra*, 553, and cases cited. Furthermore, a duty imposed to safeguard the seamen from the danger of illness without succor, and to safeguard him, in case of illness, against the consequences of his improvidence, would hardly be performed by the payment of a lump sum to cover the cost of medical attendance during life.

The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."

Petitioner has taken out of context part of a sentence of this Court in *Farrell* and on it has built an erroneous argument to support an untenable position.

In *Farrell v. U. S.*, 336 U. S. 511, the Court adopted the reasoning and the language in *Calmar* and went on to hold that even in cases where the disability was due to the seaman's service on the vessel, the shipowner's liability for maintenance was not greater than stated in *Calmar*. The suggestion on page 40 of petitioner's brief that because the petitioner's injury was service-connected his right to maintenance deserves different consideration is without legal support. The holding in the *Farrell* case is to the contrary.

McAllister v. United States, 348 U. S. 19 cited by petitioner is not apropos. In the *McAllister* case, the Court of Appeals reversed the fact finding by the district court although not deciding that the finding of the district court was clearly erroneous. This Court held that there was substantial evidence upon which the district court reached its conclusion and that, therefore, its decision should stand as not clearly erroneous.

The "clearly erroneous" doctrine is not applicable here for the very reason that the trial court made no findings of fact and conclusions of law thereon.

None of the other cases cited by petitioner in Point III of his brief (other than the *Calmar* and *Farrell* cases) is determinative of the question before this Court. This question is: "May an award of future maintenance be made in the absence of evidence to support it?" Petitioner's cases say that the determination of the limits of maintenance depend on the individual facts proven in each case. Respondent does not disagree with this. Here there was not even a scintilla of evidence that petitioner required three years further treatment. Neither of petitioner's doctors gave any testimony with respect to future treatment or its probable duration. On the other hand, respondent's doctors said that petitioner was fit for duty and, thus he would not be entitled to future maintenance (105, 106, 107, 92, 182).

The award of future maintenance was contrary to the policy of this Court and not supported by the evidence. The Court of Appeals correctly reversed it.

B.

Rule 52 F. R. C. P. provides in part: "In all actions tried upon the facts without a jury or with an advisory jury, the

court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *

The court below, in *Alexander v. Nash-Kelvinator Corporation*, 261 F. 2d 187, page 191, said:

"* * * This court is mindful of the principle² so frequently reiterated that the question of the excessiveness of a jury verdict is to be determined by the trial court on a motion for a new trial. In such cases the trial court, in effect, occupies the position of a reviewing judge. He has the power to pass upon, set aside or even reduce by remittitur excessive awards. Where a case is tried by a judge without a jury the defendant is deprived of this right. The first opportunity which an aggrieved defendant has in this respect in a non-jury trial is upon appeal. For these reasons it becomes most important that the trial court comply meticulously with the requirements of Rule 52(a) with respect to findings so that the appellate court can properly appraise the elements which entered into the award. Just as the trial judge passes upon possible passion or prejudice and all the other legal grounds for attacking excessive damages on the post-trial motion to set aside a jury verdict so on the appeal the appellate court should have some knowledge of the basis or theory upon which the trial judge acted. Without this information the defendant is unable properly to exercise the appellate rights conferred by statute and the court is equally unable to make appropriate appellate review."

All the trial court did was to erroneously state orally that there was evidence, but, of course, could not identify it,

C.

The Marine Hospital recommended that petitioner take rehabilitation treatment which he did not do (167). This

failure to submit to this treatment amounts to neglect to take the proper means to cure himself. Thus, he is barred from future maintenance. *Donovan v. Esso Shipping Company*, 152 F. Supp. 347 (DCNJ 1957), aff'd. 259 F. 2d 65 (3 C. A. 1958), cert. den. 359 U. S. 907.

Petitioner failed in his proof and the cause of action for future maintenance should have been dismissed. *U. S. v. Johnson*, 160 F. 2d 789 (9 C. A. 1947); aff'd sub nom. *Johnson v. U. S.*, 333 U. S. 46; *Wilson v. U. S.*, 229 F. 2d 277 (2 C. A. 1956); *Bailey v. City of New York*, 153 F. 2d 427 (2 C. A. 1946).

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE DISMISSED AS HAVING BEEN IMPROVIDENTLY GRANTED OR IN THE ALTERNATIVE THAT THE JUDGMENT OF THE COURT OF APPEALS REVERSING THE JURY VERDICT FOR INSUFFICIENCY OF EVIDENCE BE AFFIRMED AND THAT THE REVERSAL OF THE AWARD FOR FUTURE MAINTENANCE BY THE TRIAL COURT BE AFFIRMED.

Respectfully submitted,

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Office Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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OCTOBER TERM, 1961

No. 283

JAMES V. FORT SALLER,

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—against—

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PETITIONER'S REPLY BRIEF

Respondent's brief avoids the major question of whether a Jones Act jury's verdict should be set aside, despite a sufficiency of evidence, because of the absence of testimony for either side by an expert in naval architecture with respect to a simple issue of obvious danger. The question is not on the sufficiency of evidence to support the jury's verdict, but rather its weight as determined by the medium for its presentation. Simply stated, should we be restricted hereafter to experts pitted against experts, or continue presenting proof as in the past?

The equal split of the Court of Appeals *en banc* bespeaks the importance of this case and the paramount need for its resolution by this highest Court. We do not bring up for review the "question of sufficiency of the evidence and witness credibility" as respondent strangely contends in its first point, for the Court below concedes sufficiency of

1. Where respondent refers to "appliances readily at hand" and asks what "safety devices" and railings should have been installed, it ignores the record replete with proof and testimony that there were no adequate appliances at hand and that the bulky radar casing and the thin stiffeners were unreasonable for use as handholds. These contentions were made to the jury who had the benefit of respondent's diagram and photographs in evidence.

2. Respondent cannot minimize its failure to provide a railing, a life-line, a guide rope, or a platform that was not smooth and partly worn away without skid proof paint, which would have stayed or lessened petitioner's backward movement without anything at hand, to fall over, and then into the unprotected hole he was compelled to cross in complete darkness. Their need, absence and relationship to the accident were jury questions properly resolved. Clear and convincing proof of maritime negligence and unseaworthiness, compounded by the protracted malfunction of four of the five light bulbs, and the foreseeable blowout of the fifth that occurred, cannot be ignored by an unrelated contention that the case hinged on a "theory that its vessel was negligently constructed without proving any standards of proper naval architecture."

3. Petitioner will not comment on respondent's difference with a portion of the opinion it seeks to have affirmed, as to where petitioner was located when he slipped and fell. It was for the jury to decide whether in total darkness petitioner could have safely crossed the platform and save his fall had the railing or a simple safety device been provided. Petitioner proved the conditions of a smooth and worn platform, the bulky radar casing with electrical wiring therein, and the nature of stiffeners of such narrow and insignificant dimensions, that the jury would not be-

lieve they were reasonable handholds under the circumstances. Rhetorically stated, should petitioner be denied recovery for not having reached out in total darkness for ~~some~~ inadequate hand support, while understandably confused by fear of the predicament imposed on him by respondent, particularly where he testified "... but I don't have the time yet to grab it" (R. 28)?

4. Respondent's stress on the absence of prior accidents did not blind the jury to the truth of the singular circumstance of all five lights out to leave the area in total darkness, where before there had been the absence of four lights for a considerable time, and the testimony by all witnesses who used the radar tower on the multiple dangers involved. Again respondent asks this Court to decide a factual issue that had already been resolved. The Court below dismissed respondent's contention on a purported duty of petitioner to report a condition of danger that had long existed and was known to its responsible personnel, and held against respondent on the principle that "... it is not proper for this court to retry factual issues where there is evidence to sustain the finding below. There is such evidence in this case" (R. 206).

5. Respondent states that the crow's nest on the S.S. United States is of "vastly different construction" from the crow's nests on other vessels. If so, in this case a qualified expert on naval architecture would necessarily be one related to the design and manufacture of this singular structure. Could petitioner expect such person to give testimony in his behalf on the need of railings and other safety devices? Respondent candidly responds by admitting on page 2 of its brief that "The petitioner and his witnesses were experienced with such ladders ..."

6. Respondent vaguely refers to "other errors" still undecided, additional to its contentions on negligent rescue and petitioner's duty to report and replace the burned out lights, which the opinion below did discuss and decide against respondent. One of respondent's major examples on "other errors", however, is set forth on page 11 of its brief. It concerns the exercise of discretion by the trial Court in excluding a certain deceptive wooden mock-up and away model of the crow's nest platform. The reasons for petitioner's objection to the prejudicial effect of this model and the Court's ruling after viewing it with counsel, are expressed on the record (R. 12, 102). Respondent's contention of "other errors", than those recited above have even less merit.

7. Respondent improperly seeks to involve this Court in the "very serious dispute as to the nature and extent of petitioner's injuries", which has been resolved by a jury verdict for petitioner. It misleads the Court by stating petitioner did not undertake rehabilitation treatment. The record reference (R. 167), shows only that petitioner cancelled his first appointment with the rehabilitation center and was given a new appointment to return on December 16th, a date subsequent to conclusion of the trial. Respondent's counsel should know petitioner is still "not fit for duty," undergoing rehabilitation, and has opened the door to proof the Court may request during oral argument on petitioner's present program of rehabilitation.

8. The trial Court recorded its reasons for granting petitioner three years future maintenance (R. 139). The medical proof is substantial in support of its exercise of discretion to make the award. Though the humane and proper finding and conclusion on future maintenance were oral and concise, they nonetheless comply with Rule 52

F. R. C. P. where an exact form is not prescribed. Respondent significantly does not discuss or support the erroneous remand of the maintenance cause by the Court below which states in part that "... the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure."

CONCLUSION

In full context of the record there was no basis grounded in principles of evidence or applicable maritime law to disturb the findings by the jury and Court in favor of petitioner. It is respectfully submitted that the decision of the Court of Appeals should be reversed except as to its affirmance of the award for past maintenance.

Respectfully submitted,

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